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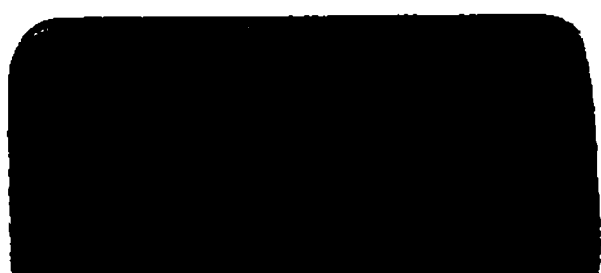
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REPORTS
OF
ADMIRALTY AND REVENUE CASES,
ARGUED AND DETERMINED
IN THE
CIRCUIT AND DISTRICT COURTS OF THE UNITED STATES,
FOR THE
WESTERN LAKE AND RIVER DISTRICTS.

By HENRY B. BROWN,
DISTRICT JUDGE, EASTERN DISTRICT OF MICHIGAN.

VOL. I.

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HENRY B. BROWN,
DISTRICT JUDGE, EASTERN DISTRICT OF MICHIGAN.

P R E F A C E .

IF any apology be needed for adding another volume to the already crowded shelves of our professional libraries, it may perhaps be found in the fact that, in the multitude of reports issued since the adoption of the Constitution, only about a dozen volumes of exclusively admiralty decisions are included; of these but one, viz., that of Mr. Newberry (of which the present volume is designed as a continuation) is devoted to cases arising upon the Western lakes and rivers. This volume was published in 1867, and is believed to be the last of the strictly Admiralty Series, excepting the 3d of Ware. By far the greater number of admiralty decisions are mingled with common law, equity, bankruptcy, and patent cases, and scattered through more than a hundred volumes of reports. Indeed this fact suggests the observation, that the present method of incorporating in the same volume these widely differing classes of cases is expensive, unphilosophical, and unsatisfactory.

Few admiralty practitioners are interested in bankruptcy business, and yet to obtain the benefit of fifty admiralty precedents, they are obliged to purchase a volume containing at least an equal number of bankruptcy cases, and in the Circuit Court reports a still larger proportion of common law and equity cases.

The same is true of the patent lawyer, who is not infrequently compelled to purchase an entire volume to obtain the benefit of a single important case. Thus a great many who would gladly buy every book devoted to the branch of the law they particularly affect (and nearly every lawyer is more or less a specialist) are deterred by the expense from purchasing at all.

The reporter ventures to suggest to the profession that cases determined by the Federal Courts, instead of being reported by *districts* might more acceptably to the bar, and, in the end, more profitably to the publishers, be reported by *classes*, viz. :

(1.) Patent cases. (The most important of these have already been reported by the late Mr. Fisher.)

(2.) Admiralty cases.

(3.) Bankruptcy cases. (These are very acceptably collated in the Bankruptcy Register.)

(4.) Criminal cases and cases peculiar to the jurisdiction and practice of the Federal Court.

No mention is made in this classification of ordinary cases at common law and equity, as they are more satisfactorily, if not better, decided by the Supreme Courts of the several States, than they can be by a single judge.

The present volume contains the more important admiralty cases determined in the Sixth Circuit during the last eighteen years. The accidents of compilation have limited it to cases arising in the two districts of Michigan and the Northern District of Ohio; but subsequent volumes, if published, will probably include cases from other districts. The fact that a large majority of these cases has arisen within the Eastern District of Michigan is due not more to the fortunate location of Detroit for admiralty business, than to the painstaking industry and marked ability of the late

Judge Longyear. Without formal dedication to that effect, this volume is intended as a tribute of respect to the memory of that most excellent judge and upright citizen.

In selecting material, the following cases have been, with few exceptions, eliminated :

- (1.) Cases turning solely upon questions of fact.
- (2.) Cases reversed.
- (3.) Cases affirmed by the Appellate Court and elsewhere reported.
- (4.) Those reannouncing principles of law already well settled.
- (5.) Cases reported in other volumes.

Probably some of the cases here reported were hardly worthy the consideration, but it is hoped the volume may prove useful to those interested in this branch of the profession.

I beg to acknowledge my indebtedness to my late partner Mr. Newberry, and to the several judges whose opinions are here published. Since the book went to press, the cases of *The Free State* (p. 251) and *The Colorado* (p. 393) have been affirmed, and that of *The Sunnyside* (p. 227) reversed by the Supreme Court.

DETROIT, March, 1876.

H. B. B. .

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DISTRICT COURT.
DISTRICT OF MICHIGAN.

HON. ROSS WILKINS, DISTRICT JUDGE.

THE GALA PLAID.

FEBRUARY, 1859.

**CERTIFICATE OF PROBABLE CAUSE.—PRACTICE.—EVIDENCE IN
SUPPORT.**

A motion for a certificate of probable cause of seizure may be made subsequent to the decree, and upon the hearing of such motion the Court is not limited to the evidence introduced upon the trial, but may receive any evidence tending to show that the collector acted upon a reasonable suspicion.

In determining the question, the Court is not at liberty to consider the fact that the seizure was made at night, without proper warrant, and that the conduct of the officer was otherwise oppressive and cruel, as his certificate would not protect him in an action for a personal trespass. The Court can only consider whether his action was malicious and groundless, or whether he acted upon a reasonable suspicion that the goods were smuggled.

The fact that the claimant was selling them at a low price in an obscure town, declaring them to have been imported, and that duty had been paid upon only a small portion, was held sufficient to justify their seizure.

MOTION for certificate of probable cause. The facts fully appear in the opinion of the Court.

Mr. *Jos. Miller*, District Attorney, for the United States.

Mr. *Alfred Russell*, for the claimant.

WILKINS, J. The libel in this case embraced a large quantity of merchandise seized by the direction of the collector of the port of Detroit, in June, 1857. The articles enumerated in the libel filled some twenty-two boxes, and con-

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sisted of gala plaid, merino, silks, dress goods, flannel, edging, muslin, lawn, silk veils, &c., in all numbering, in various quantities, some fifty different pieces and qualities of fancy merchandise, of the value of about \$1,000.

The goods were all claimed by one John Larkin, who, with his family, emigrated to this country from England, in October, 1856.

The issue joined in the case was tried by a jury on the 14th of July, 1858, a little over a year after the seizure, and as appears by the record, no other testimony was introduced than that of Thomas Thayer, and Mary Ann Larkin, the daughter of the claimant.

The former was the appraiser, called only to the identification of the articles.

The latter stated positively that all the goods enumerated in the libel were purchased from one Jackson, residing in a certain street in the city of New York, and as each article enumerated in the libel was separately called over by the District Attorney, distinctly averred that the same was bought in New York, and she being the only witness for the Government as to the fact of importation, the District Attorney abandoned the prosecution. The jury gave a verdict that the allegations of the libel were not sustained, acquitting the goods, whereupon the Court decreed a dismissal of the libel and a restitution of the property seized.

On the succeeding day a motion was made by the District Attorney, in behalf of the collector, for a certificate of probable cause, under the Acts of Congress of 1799 and 1807. The argument of the same was, by the stipulation of the proctors, postponed until the first week in November.

The practice of this Court has generally been, on releasing after a hearing the property seized, to direct, with the decree dismissing the libel, this certificate of protection to the officer, if the evidence warranted the presumption of a reasonable suspicion on his part that the goods had been illegally brought into the United States: the exoneration of this officer being placed by the law on the fact that, although the evidence did

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not warrant condemnation, yet there were sufficient circumstances disclosed to justify the seizure.

In this case the claimant was not called upon for any exculpatory evidence. The case was abandoned. The proctor of the claimant and the District Attorney of the United States stipulated at a future day to present to the consideration of the Court the present motion—a practice which does not meet the sanction of the Court, which has led to much expense and confusion, and has only been tolerated with the view of doing justice to a public officer, who was not personally present at the seizure, and if any outrage was committed, either on the rights or feelings of others, is not at least morally amenable.

Had this course not been taken, I must have refused the certificate, for there was not, on the trial, a scintilla of evidence warranting suspicion.

When the motion came up for hearing, the District Attorney offered in evidence the circumstances of suspicion upon which the collector directed the proceeding. This was objected to by claimant's counsel, on the ground that the trial was closed, and that it was not competent for the Court on this motion to hear other proof, and that it was limited in the granting or refusing of this certificate to the testimony which had been submitted on the trial.

The testimony was heard under a reservation of the Court, and after much consideration, I am satisfied that it was admissible at this stage of the proceeding, and on this motion, although the libel was dismissed and restitution decreed.

There is certainly nothing in the language of the statute that inhibits the motion being made subsequent to the rendition of the decree. In the case of the *26 Diamond Rings* (18 Law. Rep. 250), the motion was made on a day subsequent to the dismissal of the libel, and Judge Sprague, it would seem, granted the certificate upon evidence of a fact, which if offered, was not pressed during the trial, namely, the concealment of the rings by the passenger when the manifest was made containing similar articles by the same person.

The statute does not limit the evidence to that offered upon

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the trial. It declares if it shall appear to the Court before which such prosecution has been had that there was a reasonable cause of seizure, the Court shall cause a proper certificate or entry to be made thereof—that is, the *fact* is to be certified. The time when the application is to be made for such certificate is not determined, and it is not clearly inferable as the intent of the Act that such certificate should be based exclusively on the testimony offered antecedent to the decree. Had the statute declared that the final decree should embody such certificate, then the Court could hear no other evidence than that given on the trial; but, omitting so to enact, the inference is strong that the design of Congress was to enable the collector to come in at any time after judgment has been given for the claimant, and procure from the Court the certificate contemplated, on such a showing as he may be enabled to make.

The statute prescribes that the Court shall cause a proper certificate to be given or entry to be made. The alternative is with the Court to give the one or direct the other—and it is not, therefore, a necessary part of the record—not an essential journal entry, and consequently not a part of the original proceeding, unless the Court so chooses to order.

To sustain the prosecution, the evidence is given to the jury, under the direction of the Court, and it is the evidence upon which their determination is made; but whether or not the prosecutor had probable grounds for instituting a suit, is another question, and solely for the action of the Court, which may proceed to hear the matter, either during the progress of the trial after the testimony is in, or subsequently, upon the application of the officer for leave to exhibit his grounds of suspicion.

The only direction of the Act being that the subject-matter excusatory of the officer, and protective of him against the action of any other judicial tribunal, is, that such excuse shall be judged of by the Court before whom the prosecution is had.

In the case of the *Forester* (1 Newb. 81), the Court acted at once on the application of the District Attorney, the proofs on the trial being conclusive upon the point.

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The Court holding then that this inquiry may be properly gone into after the prosecution has closed, will now inquire into the sufficiency of the excuse set up and proved by the collector.

It is alleged on the part of the applicant for this certificate, that the circumstance of vending these goods in an obscure town, but sparsely inhabited, distant from any large village or city, and selling them at a low price, under the declaration by the claimant, repeatedly made to purchasers before seizure, that he had brought them from the Old Country, and paid duty only upon part of them, was sufficient to warrant his suspicion and his official action. And it is further alleged that the place of deposit and mode of sale confirmed the impression that they had been fraudulently brought into the country.

There can be no doubt that on this application the Court is confined to the circumstances existing prior to the seizure. It is an application based on an acquittal. The prosecution has failed to establish the charge, and that trial is ended.

The property has been released and restored, and the issue determined.

The Court, then, is to hear the cause of seizure, and nothing else. The Court may be satisfied, on the testimony adduced on the application, that the District Attorney was misled in abandoning the prosecution, that his witness was guilty of perjury, and that, had all the facts been brought to the notice of the Court, a decree of condemnation must have been rendered. But all this is of no avail, except so far as corroborative of the circumstances of suspicion which led to the seizure.

Furthermore, I am satisfied that the conduct of the officer in making the seizure, cruel, uncivil, oppressive or otherwise, with or without warrant, has nothing to do with the merit of this application. It presents a single question to the Court, and when resisted, a single issue, and that is—

What were the grounds of suspicion which led the collector to direct his deputy to seize the merchandise in question? Was the seizure malicious and groundless, or had the officer a

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reasonable warrant of suspicion, based on circumstances and facts which came to his knowledge and existed prior to his official action in seizing the goods ?

By the Act of 1799, sec. 63, when the collector has cause to suspect a concealment of smuggled goods in a dwelling-house, he is bound to make application under oath to a magistrate, and obtain a search warrant, which can only be executed in the daytime, in obedience to the constitutional injunction, forbidding unreasonable searches, and guaranteeing the security of private dwellings.

A seizure at night is unreasonable and prohibited, and these provisions so essential to peace and safety are re-enacted in 1815 (3 Stat. at Large, 232).

But the mode pursued by the officer, and his official action upon his suspicions, have nothing to do with the question whether his suspicions were groundless or otherwise.

If the collector, having a just and reasonable suspicion, acts without warrant, or on an irregular warrant, or illegally in making the search at night, or oppressively in seizing what is not dutiable, such as articles of clothing, or commits a personal trespass, he certainly is amenable elsewhere to the parties injured, and is not protected by the certificate of the Court, granted under the Acts of 1799, 1807, or 1823.

Did I think so, I should be very loath to grant the certificate in this case. For although I am satisfied that the warrant is a genuine document, and not a forgery (as was supposed in the argument), yet I cannot sanction, by any act of mine, the conduct of officer Cullen, in making an indiscriminate seizure of broadcloth and female chemises, of pantaloons, petticoats, French apparel, night-clothes, baby's clothes, &c., so completely stripping the apparel of the family that the children were left in nudity and the young women compelled to borrow from neighbors the requisite clothing for church.

Two exigencies are covered by the certificate :

1st. The claimant cannot recover costs, although acquitted

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because by his own conduct he misled the officer of the Government.

2d. He cannot recover damages in any action, because the proper tribunal determined that the officer was warranted in making the seizure. But, if the mode was unlawful and injurious, the certificate is but a blank piece of paper, as a shield of protection. The Act of Congress never designed to protect robbery, assault and battery, or midnight trespass under the cover of this certificate. It never designed to protect conduct forbidden by the statute itself.

It means no more than this, that certain merchandise having been seized for a violation of the revenue laws, and that fact having been tried and the goods restored, the public officer had just grounds for his official action, and no costs are awarded to the claimant.

I recur then to the issue as stated, leaving with pleasure the outrageous conduct of the officer in performing his duty.

In the case of *Locke v. The United States* (7 Cranch, 339), decided as far back as 1813, Judge Marshall says, "that the term "probable cause," as used by Congress, does not signify *prima facie* evidence, which, in the absence of exculpatory proof, would justify condemnation, but simply evidence of circumstances which warrant suspicion.

And, at a later period, what constitutes probable cause, was held by Judge Story, in the *Rover* (2 Gall. 240), to be a question of law for the Court,—in the facts exhibited justifying the officer.

And, as a question of law, the circumstances of each particular case must govern the Court. In the case of the *Friendship* (1 Gall. 111), a doubt as to the construction of the law by the officer was held to be a reasonable cause for seizure. In the *George* (1 Mason, 24), Judge Story defines "'probable cause' to import a seizure made under circumstances which warrant suspicion." And in the case of the *Forrester*, in Newberry, 81, this Court held that the circumstances which occurred when the vessel was unladen at the dock, of the captain calling in the presence of the revenue

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officer, the merchandise, "Port Sarnia stuff," warranted his seizure.

In the case of the 26 *Diamond Rings*, a very slight circumstance induced Judge Sprague to grant the certificate, namely, that the claimant was apprised of the fact that the diamond rings had been entered by him on his manifest.

When the steamer came to their moorings at Boston, the revenue officer was notified, by the captain, that there had been a robbery on board, and no passengers were to land until a legal search had been made.

The claimant came to the purser on the deck, and handed him a small parcel, containing the twenty-six rings, with a request to enter the same on the ship's manifest. This being in the presence of the revenue officer, he at once seized them. The claimant had previously entered on the manifest four cases of jewelry.

The question was, had the twenty-six rings been concealed? The Court dismissed the libel, but held that the claimant was apprised of the fact that there was a manifest in which he had caused similar goods to be entered, and that, although he had not actually concealed the goods in question, the circumstance was sufficient to warrant the suspicion of the officer.

What are the circumstances in this case, as proved, on which the collector acted?

The informer, J. H. Terry, states to him by letter of the 20th of June, 1857, that the claimant is selling, in the vicinity of Tecumseh, at his dwelling-house, a large quantity of fancy goods, in all of the value of about \$1,000. That he and his daughter say, that they recently brought these goods from England, on a greater part of which they did not pay duty; that upon certain artificial flowers duty was paid, but no duty on the residue. That the claimant was an Englishman recently come into the country; that he kept no store, but had the goods stored away in the garret of a one-story house; and that he was personally present, and heard, with other witnesses, the statement that they had not paid duty on

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them. Now, if this statement has been made out by the proof, there was sufficient ground for the seizure.

Terry himself was put upon the stand, and testified—that he was at the place where these goods were sold; that they were kept in a garret of a one-story house; that they consisted of the articles enumerated in the libel; that he heard Mary Ann Larkin say, that they did not pay duty on all the goods, and would sell cheap; that they had brought over from England 22 cases; that they had only paid duty on the artificial flowers; and that the reason why they escaped paying duty on all was that the officer did not know that they had any other goods.

This statement is corroborated by the evidence of Cullen, as to the account given to him by the claimant that the goods were brought from England, by the statement which he made to the collector himself when seeking the restoration of the property, by Holdrich, to whom claimant repeatedly said that the goods came from England, by Wheeler, who went to buy cloth, and to whom claimant said that he brought all the goods from England, and that he paid the duty only upon part, and by the affidavit of the claimant himself, made in October, 1857, in open Court, when applying for the continuance of the cause, in which he solemnly states—"that he brought all the goods seized from Liverpool in the ship Bright, openly and without the least secrecy, and that he paid to the custom house officer at New York all the duties demanded, and that he could prove all these facts by his daughter Mary Ann and his fellow-passengers."

This affidavit was made on the 12th of October, 1857, and the daughter, as a witness on behalf of the Government, swore on the trial, in July last, directly and particularly the reverse. One or the other is perjured. There is no room for charity, and the father's oath is supported by all the surrounding incidents of the case, by the declaration of the daughter to Terry, and by her testimony before the grand jury. It is true, the Court must be governed on this application by the circumstances which led to the seizure; but the

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evidence of Cullen, Shoemaker, Holdrich and Wheeler, and the affidavit of the claimant are only used as corroborating, beyond all doubt, the testimony of Terry and the circumstances proved by him : That duty was not paid upon these goods, and that they could be sold cheap.

The circumstances of this case strongly illustrate the propriety of the ruling that the Court should not, in all cases of seizure under the revenue laws, determine the propriety of the certificate on the facts elicited on the trial of the main issue.

Here the District Attorney introduced only the evidence of the daughter of the claimant. Had he recollected, and called the attention of the Court to this affidavit of John Larkin, the comparison between it and the bare-faced, perilous, minute swearing of Mary Ann would have elicited from the Court a course of procedure, calling peremptorily for the punishment of either the father or daughter for willful and corrupt perjury.

The Court believed what appeared to be the frank statement of the woman, that each article was purchased in New York, and sympathized with the witness in the evident spoliation of part of her property, in a strange land, where she had sought a livelihood in the neighborhood of her relatives.

As the facts turn out, there should have been a condemnation. The proof then on file warranted it. The depositions of Dawson and Benedict, the custom house officers of New York, as to the non-payment of duty, the sworn avowal of John Larkin on file, and the proof of his declarations by Cullen, Wheeler, and Holdrich, with Mary Ann's avowal, would have overwhelmed her statement in Court, and caused a condemnation.

Motion granted.

THE CANADIAN.

JUNE, 1856.

PASSENGER'S CONTRACT.—DAMAGES.

Where the master of a schooner who had taken passage on a steamer to rejoin his vessel, was carried past the place for which he had bought his ticket, and at which the steamer usually stopped, he was held entitled to recover not only for his personal expenses and loss of time, but damages in the nature of demurrage for the detention of his vessel.

LIBEL for breach of contract in failing to land a passenger at the port to which he had taken passage. Libellant was the master of a vessel lying at Algonac, an intermediate port on the St. Clair river, between Detroit and Lake Huron. He had left his vessel, going up the river, and secured her a cargo, and on the 4th of July took passage on the Canadian, at Port Huron, paid his fare to Algonac, with the intention of stopping there and rejoining his vessel. Evidence was given that the steamer usually stopped there, and that the clerk informed libellant she would stop there on that trip. She did not stop, however, but carried libellant on to Detroit, whereby he was prevented from rejoining his vessel before the afternoon of the following day. The wind which had been favorable during the 4th and 5th, shifted to the northward on the evening of the 5th, and prevented the departure of the vessel before noon of the 7th. She thereby lost the cargo which libellant had engaged.

Mr. *John S. Newberry*, for libellant.

Mr. *Alfred Russell*, for claimant.

WILKINS, J. This action is brought to recover damages for a breach of contract in failing to land the libellant at Algonac, for which place he had purchased his ticket.

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The contract and its breach are admitted. Libellant took passage on the Canadian for Algonac, with the assurance that the steamer would stop there on her downward trip. He procured his ticket with that understanding, the clerk stating she would land him there. When opposite this place he refused to put the libellant ashore, but the owner being on board directed her master "to put her through and not to stop," and the steamer passed on to Detroit, taking the libellant with her. These facts are not controverted.

The only question is as to the damages. These must be limited to the actual loss sustained by the libellant in consequence of the failure of the steamer to perform her contract. He was at the time owner of the schooner Oceana, which was lying at Algonac waiting for him, he having gone up to Lexington to engage a cargo for her. It is alleged, though not very satisfactorily proven, that he failed to obtain this by reason of his delay in reaching the schooner.

He is entitled, however, to remuneration for his loss of time and damages in the nature of demurrage for the detention of his vessel for three days. This, with his personal outlay, amounts to \$103.50, for which a decree will be entered, rejecting the estimate of the probable profits of a trip to Cleveland.

This action is clearly sustainable. The passenger thus wronged should be compensated in damages adequate to the nature of the injury, and passenger steamers must be kept to the fulfillment of their engagements.

Decree for libellant.

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THE SULTANA.

FEBRUARY, 1857.

SEAMAN'S WAGES.—CLERK OF A STEAMBOAT.

The clerk of a steamboat is a mariner, and entitled to a lien for wages.

LIBEL for wages. Libellant was hired and served during the autumn of 1856 as clerk of the Sultana, and claimed a lien for his wages.

WILKINS, J. The clerk of a steamboat is a mariner, within the meaning of the law conferring a lien for wages. (*Curtis on Merchant Seamen*, p. 5, and notes; *The Prince George*, 3 Hagg. 376; 2 *Bouv. Law Dic.* p. 405; *Mills v. Long*, referred to in 2 *Dod.* 105; *Wilson v. The Ohio*, Gilpin, 505; *Flanders on Mar. Law*, 354; *Ross v. Walker*, 2 *Wilson*, 264; *Trainer v. Superior*, Gilpin, 514.)

Decree for libellant.

THE ILLINOIS.

MARCH, 1857.

PRACTICE.—SETTING ASIDE DECREES.—RULE 40.

It seems a Court of Admiralty has no general power, at least after expiration of the term to set aside a final decree on the ground of oversight, inadvertence, or mistake.

The ten days allowed by Rule 40 for setting aside a decree, are restrictive, and a motion made after this time cannot be entertained.

THIS was a motion by William Dixon, master of the propeller Illinois, to open a decree obtained by default, and for leave to answer.

A libel for collision was filed against the propeller, September 3d, 1855. The propeller was seized, and the usual stipulation given, to answer judgment, on the 15th of the same month. Certain depositions were taken in Cleveland on the 26th, and upon October 23d, no answer having been filed, although an appearance had been put in, a default was entered, and the cause referred to the clerk to assess damages. On Oct. 25th he made his report, and on the 29th a final decree was entered for \$1,926 and costs. An appeal was taken from this decree, November 6th, and in the following June the appeal was dismissed by the Circuit Court. On August 26th, 1856, this motion was made upon affidavits of merit, and a further showing that claimant's proctor was absent from the city when the time given to answer had expired and the decree was taken, and that he had taken the appeal supposing the case could be reheard upon the merits. An answer was also tendered.

Mr. James V. Campbell, for the motion.

Mr. John S. Newberry, contra.

WILKINS, J. Upon the return day of the process in this case, twenty days were taken by claimants to answer. At the expiration of this time, his counsel being engaged in the trial of a cause at Monroe, which had been unexpectedly prolonged, his default was taken, and a final decree was entered, Oct. 29, 1855, for \$1,926. Claimant's counsel returned from Monroe a few days after the decree was entered, and at once took an appeal to the Circuit Court. This appeal was, however, dismissed upon the ground that an appeal would not lie upon a decree taken by default. He now moves the Court to open the decree, and for leave to answer.

Under General Admiralty Rule 29, the Court may, in its discretion, set aside a default, and admit the defendant to answer at any time before final hearing and decree, upon payment of costs. This rule obviously has no application to

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cases where a final decree has been entered. Under Rule 40, the Court may, in its discretion, upon motion of defendant and payment of costs, rescind a decree by default and grant a rehearing, *at any time within ten days after the decree has been entered*. The material point to be determined in this case is whether the Court has power thus to rescind a decree not only after the ten days have expired, but when a whole term has intervened between the rendering of the decree and the making of the motion.

Aside from the rule, I have very grave doubt whether a Court of Admiralty ought to open a final decree, particularly after expiration of the term, upon the ground of oversight, mistake, or forgetfulness on the part of defendant or his counsel. The English authorities are unanimous in holding that a final decree cannot be opened upon this ground.

In the case of *The Vrouw Hermina* (1 Ch. Rob. 163, 168), a decree was rendered, Jan. 27, 1799. On the 7th of Feb. the counsel moved to open it, on the ground of a mistake on his part. The Court (Sir W. Scott) says, "I will not go so far as to lay it down universally, that it is not in the power of the Court to reconsider its decrees on very particular occasions." Speaking of the case then before the Court, he says, "as a precedent, it would be a practice highly dangerous, and the liberty of reviewing its decrees, *if it exists, which I do not affirm*, is a liberty which the Court would exercise with very great caution; because I foresee that, were applications of this sort to be easily admitted, they would be very frequently made on reasons much less sincere than those which are now offered to the Court." "Without discussing the power of reviewing a sentence," he rejects this application.

In the case of *The Elizabeth* (2 Acton, 57), application was made to rescind a decree condemning the cargo, on the ground that there had been an understanding that upon the production of certain affidavits consent should be given to a rescission of the decree—and these proofs were now produced—and the counsel cited a case, to show that the Court would rescind its decrees. But the Court (Sir John Nicholl) says: "As far as

I recollect that case, it rather proved the rule that this Court does not rescind its decrees. The motion to rescind was made upon a reference to the registrar and merchants; but was refused, as it was said it was not the practice of this Court to rescind its decrees, and open the matter anew, whatever other redress the parties might obtain by an application to the Court, should it be proved they were materially aggrieved"—and the application was refused.

The case cited by the counsel above was that of the *Geheimrath*, decided in 1798, in which it was represented to the Court that since the decree the proofs upon which the decree had been rendered *had been impeached, and shown to be fraudulent*, and a motion was made to rescind and allow evidence to be given *of that fraud*. "But the Court refused, and said, their decree being final, it would be contrary to their practice to rescind it and open the subject anew; nor where even it appeared *a fraud* had been practiced, they could not go out of the order of their practice; the parties, however, might apply to the Court in another shape, if they could satisfactorily prove they were aggrieved."

In the case of the *Fortitudo* (2 Dodson, 58, June, 1815), the libellants commenced one action on a bottomry bond—then dismissed it, alleging the claim was settled. Shortly after they commenced a new suit, on the same bond. The defendants moved to dismiss the latter suit, on that ground—and the Court granted the motion, with costs, and demurrage. The Court (Sir W. Scott, p. 70), after commenting on the affidavits, says: "They do not, in my apprehension at least, render it necessary that I should inquire how far the permission again to *open a case which has been once closed* comes within the range of that large discretion with which this Court is by its commission intrusted. It might, perhaps, within the limits of that very extended equity which it is in the habit of exercising, deem it not improper in some cases to suffer a cause to be reopened. *But it certainly would not do so unless there existed very strong reasons to show the propriety of the measure.* I feel no hesitation in saying that *mere neg-*

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ligence, or oversight, would not be a sufficient ground for such an extraordinary interposition of the authority of the Court. A direct case of fraud, or something equivalent to it must be made out, before I can suffer such a step to be taken." And then he says, in regard to the affidavits, "Let us see, then, whether there be any such ground in the present case. *There has been no fraudulent concealment or withholding of documents. The master has sworn, and it is not denied that he produced all the papers and delivered them over to the (libellant, who) must be presumed to have examined and scrutinized them. They cannot now be heard to say that they acted improvidently and without due caution. If they did so in point of fact, they must abide by the consequences of their own negligence."*

A case relied upon by the defendant's counsel is that of *The Monarch* (1 W. Rob. 21), decided in 1839. An *interlocutory* decree had been pronounced by Sir John Nicholl, deceased, after a hearing on evidence, it being a case of collision, declaring *both parties in fault*, and referring the cause to the registrar to take accounts, &c. A question of *costs* was afterwards raised, and a motion made to alter the decree *in that particular*; and a decision made in the House of Lords, in 1824, was cited to show that in such a case the costs should have been (as a *matter of law*) decreed differently. Doctor Lushington, who heard the motion, refers to that case, and says that if that case had been brought to the notice of Sir John Nicholl he would unquestionably have varied the decree to conform to it, as regards the costs, *if it had been in his power*. He then goes on to consider whether he would have had the power, according to the practice of the Court. He says (p. 26): "If it was a frequent practice to alter the decisions of the Court, much evil and inconvenience would doubtless ensue in consequence. At the same time, it is to be observed that great injustice may be occasioned if this Court has not such a discretionary power of varying its decrees as is possessed by other Courts of this country. The Court of

Chancery, *before enrollment of a decree*, may, and often does alter, vary and amend it, &c.”

This case does not sustain the defendant.

In the first place, there had been no *final decree* at all—and the case was still before the Court, standing on a mere “interlocutory” decree of reference—and yet the Court hesitated much about granting the motion.

In the second place, the amendment which was allowed was one *of law* entirely, and not of facts. It was a case of an error of the Court, as to the law—an error *apparently of record*. Again, it was an *amendment*, merely, and not a rescission—still less a re-opening of the case for new proofs.

Judge Conkling (2 Adm. p. 367), commenting on this case, says: “It seems very clear that the learned Judge entertained no notion of any power in the Court analogous to that exercised by Courts of equity upon a bill of review, or of any power *to grant a rehearing upon questions of fact*.” “The error to be corrected in the case before him was *an error of law*,”—and he says that this is the only case that contains, so far as he has discovered, an explanation of the views entertained by the High Court of Admiralty on this point.

These cases, extending over a period of sixty years, show that negligence, inadvertence, oversight, mistake of counsel or party, are no grounds for rescinding decrees, on motion, whatever other mode there may be. Fraud, or its equivalent, is the only ground, and in one case even that was held not to be good ground.

The Courts of Admiralty in this country apparently follow the same practice. In the case of *The Avery* (2 Gall. 386), a decree had been rendered, condemning as prize a British vessel and cargo; afterwards a claim was presented by certain merchants of Morocco, alleging the property to be theirs, and asking that the decree be rescinded. The Court refused. And Judge Story says that in cases of prize, a reasonable time is allowed for neutral claimants to interfere, “and if no claim is interposed within that time, condemnation follows of course, *in pœnam contumaciæ*. Nor is this a mere

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arbitrary regulation. It is to be found in analogous cases in the common law, &c.," "at all events, it is a *part of the Admiralty law which this Court is bound to respect*, and we are not at liberty, upon any notions of supposed inconvenience, to create a novel regulation. If the present be found unsuitable to our circumstances, as a maritime power, it will be for the Legislature to devise a more just and equitable rule. *Stare decisis* is a great maxim in the administration of the law of nations." "This Court can have no more *jurisdiction to revive or review* the cause, or to sustain the present application, than it *can have to adjudicate upon any other cause which has been determined within twenty years.*" "It is utterly incompetent in this Court, sitting as such, to grant an appeal in a cause *which is no longer within their cognizance.*"

The case of *The Martha* (1 Blatch. & How. 151), decided in 1830, is in point, and the Court, Judge Betts presiding, lays down the doctrine and its reasons at full length. In this case, a decree had been pronounced, dismissing the libel, with costs; afterward, and in the following term, a motion was made to vary the decree as to the costs, and the motion was heard and granted. But on another motion being made for a decree against the *sureties* for those costs, the matter again came up, and the Court vacated the last order, the Judge observing he had supposed, when he made that order, that the case was still open. At p. 171 he says: "I should certainly never have allowed the argument in this cause to proceed, unless I had supposed that the whole case was under the control of the Court, and that the former decree stood suspended until a decision could be had upon the question of costs." "The proposition now before the Court is, whether a Court of Admiralty, after hearing and definitive decree, can, of its own authority, rehear the cause or nullify the decree at any time subsequent to the term in which it was rendered." "The proceeding in this case had all the effect of a rehearing—*the case had been disposed of.*" He alludes to the practice in the English Admiralty and Ecclesiastical Courts, and in the French Courts. As to the latter, he says: "In the French practice, which con-

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forms very closely to the civil, the judgment becomes perfect as soon as it is pronounced, and the Judge cannot correct it after the rising of the Court, and after the register has entered the judgment upon the minutes as it was given." (Cites *Pothier on Civil Procedure*, ch. 5, art. 2.) He says that Courts of Chancery allow a rehearing upon sufficient reasons, at any time before decree enrolled, "*but this practice has never been introduced into the Courts of Common Law or Admiralty.*"

The Judge then gives the reasons for this rule, as derived from "the character of the suits usually prosecuted here." "Usually it is of the last importance to suitors here to have an immediate dispatch of their business. Seafaring men are not in circumstances to conduct protracted and reiterated litigations upon their claims, and it is usually better for their interests to have prompt decisions, even though adverse to their demands. Experience, I believe, fully justifies the remark, that whether in the Instance or the Prize Courts, every delay and appeal is of serious detriment to the mariner's interest. The sum in dispute is usually small and of immediate necessity to the suitor. It is for his interest, therefore, that the most speedy decision possible should be obtained, and that when it is adverse to him, he should rather go immediately to his employment than linger over the contingencies of a reconsideration of his case. These views have probably led to the exclusion from Courts of Admiralty of the practice referred to, and I concur in the sentiments of the eminent men sitting in the English Admiralty and Consistory Courts upon this point, that it is a matter of great doubt whether a power of this description should be exercised in this Court without the free consent of all parties to be affected by it."

In the case of the steamboat *New England* (3 Sumner, 495), a petition, in the nature of a libel for a rehearing, or of a libel of review, had been filed. In deciding whether such a libel was admissible in admiralty practice, the Court (Judge Story, p. 502) refers to the case of *The Fortitudo*, above cited, and then says: "But I am not aware that after the decree

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has been enrolled or entered on record, and the term has passed, that any Court of Admiralty, at least in this country, has ever entertained an application for rehearing. In the High Court of Prize Commissioners in England, it is said to be the practice never to rescind a decree after it is passed, or to open the subject anew. But at the same time it was, by implication, admitted that another mode of redress might be adopted, meaning, I suppose, that a libel in the nature of a bill of review in equity might be sustained, &c."

A libel of review is, of course, very different from a "motion."

These cases in England and America settle this point, it would seem, beyond controversy, that Courts of Admiralty cannot, *on motion*, rescind a decree. There may be another form of remedy, but what that is we are not here called upon to discuss. Judge Story seems to think a *libel of review* would lie, but the present is a mere motion.

In this respect (of not rescinding a decree after the term is passed) other Courts follow the same rule.

In *Hudson & Smith v. Guestier*, a question was decided in the Supreme Court of the United States, at February term, 1810 (6 Cranch, 281). At February term, 1812, a motion was made that the case be reheard (7 Cranch, 1), but the Court say, "that the case could not be reheard after the term in which it had been decided."

This case is a leading one. It is cited by Judge Story in *The Avery*, above cited (1815); by Judge Betts in *The Martha* (1830).

In *Martin v. Hunter's Lessee* (1 Wheat. 355 [1816]), the Court say: "A final judgment of this Court is supposed to be conclusive upon the rights which it decides, and no statute has provided any process by which this Court can revise its own judgments. In several cases which have been formerly adjudged in this Court, the same point was argued by counsel, and expressly overruled. It was solemnly held that a final judgment of this Court was conclusive upon the parties, and could not be re-examined."

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In *Sibbald v. United States* (12 Peters, 491 [1838]), the Court say: "No principle is better settled, or of more universal application, than that no Court can reverse or annul its own final decrees or judgments, for errors of fact or law, after the term at which they have been rendered, unless for clerical mistakes, or to reinstate a cause dismissed by mistake—from which it follows that no change or modification can be made, which may substantially vary or affect it in any material thing. Bills of review in equity, and writs of error *coram vobis* at law, are exceptions which cannot affect the present motion."

In *Wash. Bridge Co. v. Stewart* (3 How. 425 [1844]), the Court say, "The want of power in this Court to review its judgments or decrees, has been so frequently determined by it, that it is not now an open question."

In the Circuit Court of the United States the same rule prevails at law and in equity. In *Albers v. Whitney* (1 Story), 310, a motion to amend a judgment by inserting "John," instead of "James," which had been inserted in the writ by mistake, was refused. Judge Story alludes to the United States statute of jeofails (Judiciary Act of 1789, sec. 32), and says it provides for amendments in form only—that by it "no authority is given to the Courts of the United States to make any amendments in judgments, except as to defects and want of form," and this he says is not a matter of form, and there is nothing on the record to amend by. He further says, "It is plain that at common law, no judgment was amendable after the term at which it was entered, and amendments could be made in the process, &c., only while the cause stood in paper, and before judgment. The authority to amend them, even in England, in cases of this sort, is dependent upon and limited by statute."

In *Wood v. Luse* (4 M'Lean, 254), a motion was made, after judgment rendered and the term elapsed, to set aside certain proceedings in the case. The Court say, "If the motion was not objectionable on other grounds, it is clear that the proceeding on the original suit, and the notes on which it was founded, could not be revised in this manner." Refer-

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ring to the New York practice, he says: "But by the common law, the judgment of a previous term cannot be set aside on motion; and this is the doctrine of the Supreme Court,"—"a clerical error in the entry of the judgment will be corrected at any time, but *judgments cannot be set aside on motion, after the term at which they were entered.*"

In *Doggett v. Emerson* (1 Woodb. & Minot, 1), a motion was made (in equity) to vary a decree pronounced, but not actually entered, at a previous term. The motion was refused, and Judge Woodbury says: "But as an entry is necessary to complete their operation and give them full effect, like an enrollment of a decree, or a signature of it by the Chancellor in England, it is in the power of the Court to make changes in them *before that is done*, and probably *before the term closes* at which the entry is made." But after it is once pronounced and communicated to the parties, it would be, he says, "altogether destructive of judicial consistency and firmness to do so, unless made upon good and urgent cause, on a full rehearing by both parties." "There must be shown some *obvious mistake* of law or fact, or some new matter since discovered;" and he cites *The Avery* (above cited) as holding that the Court will not grant a rehearing after the term has ended.

In *Jackson v. Eldridge* (1 Wood. & M. 61), the Court refused to vary a decree in chancery on petition. The Judge says, "a decree is usually considered final after the end of the term at which it was rendered"—but may be before, as it was in this case. After it is final, a mere clerical mistake in figures or form, may be corrected on motion or petition, "*but nothing done which* goes to its merits and to the principles or orders themselves that have been made by the Court." "In States where no statutes exist expressly remedying such cases, it is very questionable whether any power exists at common law to re-open or change, in a material part, any final judgment. He refers to the case of *Cameron v. McRoberts* (above cited), and says, that though in that case

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“some years had elapsed, the principle is the same whether it be days or years, if the judgment has gone from the waste book and minutes, and been entered up as perfected.” And he also refers to a case not reported, *Dixon v. Lewis*, before the Supreme Court, at January term, 1845, in which the Circuit Court had *suspended* a final judgment by default, on motion of the defendant, on the ground that he had been prevented from appearing by mistake as to the term of the Court. The majority of the Supreme Court held that the Court below *had no power to suspend that judgment*—but the case went off upon another ground.

In the State Courts the same rule prevails.

In *Miller v. Hemphill* (4 Eng. [Ark.] 488), in chancery, an order was made, Oct. 10, 1845, dismissing a cause *for want of prosecution*. On the 10th April, 1846, *on motion* and affidavits, the cause was reinstated. On appeal, it was held that that order “was clearly *coram non judice*, inasmuch as at the term next preceding, the cause had been dismissed for alleged want of prosecution.” See also *Smith v. Stinnet* (1 Pike, 501).

In *Hill v. Richards* (11 S. & M. 194, 9), a bill in chancery was dismissed in 1842, on account of the failure of complainant to give security for costs, as required by a previous order. In 1846, a receiver, who had been appointed, and had acted in the case before its dismissal, applied by petition to the Court for an allowance, which was granted. On appeal the Court say, “a petition, in many respects, very nearly resembles a motion, &c. Either one or the other *is proper only when a case is pending*,” or when a Court of Chancery has jurisdiction on petition by *express statute*. “After the dismissal of the bill in 1842, the original cause was *no longer in Court*, the parties were no longer before it, and *its jurisdiction* was at an end.”

This case was approved and same point decided in *Starke v. Lewis* (23 Miss. [1 Cnsh.] 151).

In *Deeds v. Deeds* (1 Greene [Iowa], 394), a decree was granted in June, 1847, divorcing the parties, and giving the custody of children to the father. Afterwards a petition was pre-

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sented to set aside the latter provision, and granted. On appeal, held erroneous. The appellate Court say that part of the decree "is absolute, and cannot be changed, altered or reversed by any Court except an appellate Court," or by bill, &c., *impeaching it for fraud*, or matter arising afterward.

In *Burch v. Scott* (1 Gill & Johns. 393), the Court of Appeals held that "a decree signed and enrolled could not be reheard on petition," and that it would be considered as enrolled when signed by the Chancellor and the term ended.

In *Pfeltz v. Pfeltz* (1 Maryland Ch. Dec. 456), that case is cited and approved, and the same point decided. The Court say, "it is clear that if an application were made by petition to open the enrollment and vacate the decree, it must be refused." The decree in this case was by default or *pro confesso*.

In *Thompson v. Ward* (8 B. Monr. 26), the Court say, a decree can only be set aside for error or fraud. In the former case only by appeal or writ of error, or by bill of review—in the latter, only by an original bill.

In the *Commonwealth v. Shanks* (10 B. Mon. 304), the Court below, after the end of the term, varied a judgment at law as to the costs. On appeal, held, "the order or judgment made at the November term was a final order—nothing was left open for the future action of the Court, and no power was reserved to change or modify the judgment. If an execution had been issued not authorized by the judgment, the Court could, at a subsequent term, have quashed it, &c., or quashed the taxation of costs, if improperly made *by the clerk*, but they had no authority to correct their final judgment, after the close of the term at which it was made."

In *Ashley v. Glasgow* (7 Mo. 320), a motion was made to set aside a judgment for costs made at a previous term—refused. On appeal, held, "when the term is past, then the control of the Court ceases, and no alteration or amendment can be made but such as is authorized by the statute of jeofails and amendments."

In *Lindell v. Bank of Missouri* (4 Mo. 228), judgment was

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rendered, November term, 1825, against the bank. The record stated that the parties "appeared by their attorneys." In 1833 the bank moved to set aside the judgment, on the ground that there had been no notice or lawful process served. Motion granted. On error to the Supreme Court, the Court say: "The only question to be considered is, whether the Court could, contrary to the record, receive proof that the parties were not rightfully in Court. The record says the bank appeared by attorney. This must stand as true; at all events, it cannot be contradicted by affidavit. If this were allowed, *then every judgment rendered in a Court of record would at all times be subject to the same proceeding*; no property would be safe, the sanctity of a record would be lost, and with it all security for right. It may be, if the attorney who appeared for the bank, did so by mistake, this mistake, if discovered, might be corrected *during the term, but hardly afterwards.*"

In *Lampsett v. Whitney* (3 Scam. 170), a motion was made at December term, 1841, to rehear a cause decided at December term, 1840—refused. The Court say, "one term has intervened, &c., and it is now too late to make it. The Court conceives *it has no power over the case.*" "It is believed that in no instance has the Court entertained a petition for a rehearing after the lapse of a term."

From these cases it appears that it is not in Admiralty Courts alone that this rule prevails.

It may at first view seem harsh, and in some cases it may operate hardly. Yet it is the only safe rule that can be followed. Any other practice would destroy the sanctity and conclusiveness of records, open the door to endless litigation, unsettle rights of property and person, cause delay, expense and ruin—"Interest reipublicæ ut sit finis litium"—it would accumulate and clog the business of the Courts, and render it impossible to get through it. As the rule now is, parties understand their rights and duties, and it becomes them to be vigilant and prompt, and not to sleep upon them.

Now what effect does Rule 40, of which we have spoken,

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have? It does alter the general practice, so far as to allow a decree by default to be opened, on good cause shown, after the decree is rendered, and even after the term is ended, in cases where the term ends before the ten days are expired. But the privilege thus given is expressly limited to the ten days specified, and unless applied for within that period, no benefit whatever can be derived *from that rule*. The rule carries with it no power or force *beyond its express terms*.

The Court in making that rule, evidently had in view the general admiralty practice, which forbids, as we have shown, any interference with a decree after it is once rendered. In a spirit of liberality, the Court saw fit to relax that general rule to a certain extent, and no more. The fact that it did so relax it does not authorize this Court to relax it still more. The fact that it *fixed the limit* and the boundary is evidence that it intended that that limit *should not* be passed.

The rule is to be construed as if it were *a law*, and it has all the force of a statute. This appears from the history of its adoption.

Congress, on the 23d of August, 1842, passed an act (sec. 6, 5 Stat. at Large, p. 516) authorizing the Supreme Court to adopt rules for the government of the Admiralty Courts. In pursuance of this act, the Supreme Court, at January term, 1845, adopted these rules. The rules so adopted were in effect adopted *by Congress itself*, the Supreme Court being but its agent for that purpose.

In the State Courts of Michigan it is held that their rules, adopted in a like manner, have the force of statutes.

But whether they are to be considered as a *statute* passed by Congress or not, yet they are prescribed *by the Supreme Court*, and are *the law of this Court*, which is a subordinate one, and bound to obey the requirements of its superior. So far as this Court then is concerned, they are, at all events, "*a law*," and to be considered as such.

There are many authorities which hold that a rule, even of its own making, *is a law of the Court*—and that the Court

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has no discretion to depart from them. (*Ram on Legal Judgments*, 33; *Ogden v. Robertson*, 3 Green, 124; *Rex v. Mann*, 2 Strange, 755; *Dunbar v. Conway*, 11 Gill & Johns. 92; *Wall v. Wall*, 2 Har. & Gill, 79; *Thompson v. Hatch*, 3 Pick. 512.)

A fortiori, this will apply to a rule prescribed by a superior Court.

A rule may be *extended* on application beforehand, but when once the period prescribed by a rule is passed, *rights have vested* which the Court cannot take away.

Now then, construing this rule as a law, what operation is to be given to it?

Dwarris (on Statutes, 641) says: "It is a maxim, generally true, that if an affirmative statute which is introductive of a new law, directs a thing to be done in a certain manner, that thing shall not, even although there are no negative words, be done in any other manner." Again, "If a new power be given by an affirmative statute to a certain person by the designation of that one person, although it be an affirmative statute, all other persons are in general excluded from the exercise of the power, since *inclusio unius est exclusio alterius*. Thus, if an action founded on a statute be directed to be brought before the *Justice of Glamorgan, in his sessions*, it cannot be brought before any other person, or in any other place."

Again, at p. 667, he says, "An act of Parliament sometimes directs the manner in which a defendant shall be entitled to take advantage of the enactment, as by pleading the statute in bar; in such cases the party *must pursue the remedy pointed out*, or if he do not avail himself of it *at the proper time, and in the manner and form prescribed*, he cannot take advantage of it afterwards."

At 6 Bacon's Abridg. 383-4, the following rules for the construction of statutes are laid down. He says we must consider the old law, the mischief, the remedy, and the reason of the remedy. He says, "the best construction of a statute is to construe it *as near the rule and reason of the common law*

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as may be." "When a statute directs a thing to be done generally, and *does not appoint any special manner*, it shall be done according to the course of the common law." "In all doubtful matters, and where the expression is in general terms, statutes are to receive such a construction as may be *agreeable to the rules of the common law* in cases of that nature; for statutes *are not presumed to make any alteration in the common law, farther or otherwise than the act expressly declares*; therefore, in all general matters, the law presumes the act did not intend to make any alteration, for if the Parliament had had that design *they would have expressed it in the act*." Again, "If a new remedy be given by a statute in any particular case, this shall not be extended to alter the common law *in any other than that case*." Again, "A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter." Again, at p. 391, "Every statute ought to be construed for the preventing of delay as much as possible." "If the meaning of a statute is doubtful, the *consequences* are to be considered in the construction; but where the meaning is plain, no consequences are to be regarded, for this would be assuming a legislative authority." "A statute creating a new jurisdiction ought to be construed strictly."

Let us apply these rules to the present case: This Rule 40 gives a *new remedy*—it is an innovation on the common law of admiralty (so to speak)—it gives a *new jurisdiction* to the Court.

It is, therefore, to be construed strictly—as near the common law rule as possible. It is not to be presumed the rule was intended to alter the common law rule "farther or otherwise than it expressly declares."

This rule is calculated to cause delay. It must be so constructed as to prevent delay "as much as possible."

But the important point is, that the remedy given is to be sought in a special manner, and at a special time, and it cannot be done in any other manner. The words of *Dwarris*, at p. 667, are expressly applicable.

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This principle is a plain one, and is acted upon every day. For instance, the statutes of Michigan authorize the defendant to redeem land sold under execution at any time within twelve months. No one has ever claimed that that statute gave him any privilege beyond its express letter, or that he could redeem an instant beyond the time fixed.

Again, it is a principle that applies to contracts and statutes both, that the express enumeration or adoption of certain things is an exclusion of all others.

Judge Leavitt, in the case of *Ward v. Ogdensburgh* (5 McLean, 641), commenting on Adm. Rule 15 (which allows, in cases of collision, a suit either against the ship and master, or against the ship alone, or against the master or the owner alone *in personam*), said that inasmuch as this rule expressly enumerated those classes of suits, it was in effect a prohibition of all others; and he held that an action against the *ship and owners* could not be sustained; and he cites several cases to sustain his decision; and his decision on this point was not reversed on appeal, the point being abandoned by counsel.

In *Marbury v. Madison* (1 Cranch, 174), a question arose as to the extent of the original (contradistinguished from appellate) jurisdiction of the Supreme Court. The constitution declares that "the Supreme Court shall have original jurisdiction in all cases affecting ambassadors, &c. In all other cases it shall have appellate jurisdiction." It was insisted that as the clause giving original jurisdiction contained no negative word, the Congress could by statute give it in other cases than those enumerated. But the Court held otherwise, and said, "affirmative words are often in their operation negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them, or they have no operation at all."

Judge Story (1 Com. on Const. sec. 448), says: "There are certain maxims which have found their way, not only into judicial discussion, but into the business of common life, as founded in common sense and common convenience. Thus it is often said that in an instrument a specification of particu-

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lars is an exclusion of generals, or the expression of one thing is the exclusion of another. Lord Bacon's remark, that 'as exception strengthens the force of law in cases not excepted, so enumeration weakens it in cases not enumerated,' has been perpetually referred to as a fine illustration." Again: "there can be no doubt that an affirmative grant of power in many cases will imply an exclusion of all others. As for instance, the Constitution declares that the power of Congress shall extend to certain enumerated cases. This specification of particulars evidently excludes all pretension to a general legislative authority. Why? Because an affirmative grant of special powers would be absurd as well as useless, if a general authority were intended."

In the present case, to give this Court power to open a decree at any time *within ten days*, would be useless, if the Supreme Court meant or understood that they had the same power *without* the rule, or that they had it after the ten days expired.

The affirmative grant, I think, of the ten days' limit, is an exclusion and prohibition of all other time.

Again, Judge Story, speaking of the constitutional powers of the government, says (1 Com. Const. sec. 426): "On the other hand, a rule of equal importance is not to enlarge the construction of a given power beyond the fair scope of its terms, merely because the restriction is inconvenient, impolitic, or even mischievous. If it be mischievous, the people may remedy it." If they do not choose to do so, the presumption is, that *the mischief done by a restriction of power, is less than would arise by its extension*. It is a choice between two evils, choosing the least.

The same remark will apply to grants of judicial power; the grant is not to be extended by construction beyond its fair terms. If mischief ensues in individual cases, it is better to bear that than the greater evil of extending the power.

If I am correct in the foregoing views, then, inasmuch as the ten days allowed by the rule elapsed before this motion was made, it cannot be entertained. It will undoubtedly

The Napoleon.

operate harshly upon the defendant in this case; but I am satisfied that if he is entitled to any relief, it must be obtained by some other proceeding.

Motion denied.

THE NAPOLEON.

MARCH, 1857.

COLLISION.—VESSEL AGROUND IN NARROW CHANNEL, ETC.—RIGHT OF WAY.

Where a tug is working at a vessel aground in the channel of St. Clair flats, it is her duty to obstruct navigation as little as possible, and to give way to passing vessels, though it may require a temporary suspension of her efforts. In approaching a tug so engaged, the master of a steamer has a right to rely upon her observance of this duty, and the same precautions are not demanded of him as would be if no such obligation rested upon the tug.

ON libel of Chester Kimball, for damages sustained by the steamtug J. D. Morton in a collision upon the St. Clair flats. At the time of the collision, which was on the 30th of August, A. D. 1856, the Morton was engaged in getting off the Torrent, which was aground upon the St. Clair flats, on the southerly side of the channel, and about a quarter of a mile from the lower end. The tug had taken a line about forty feet in length from the schooner, and was endeavoring by slackening and then going ahead at full speed, by a sudden jerk to start her off. The schooner Muskingum was also lying aground on the opposite or northerly side of the channel, and to the southwest of the Morton. In pulling on the Torrent, the Morton was headed up and partly across the channel, although it was charged in the libel that there was a clear passage of ten rods wide between her and the northerly bank.

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While lying in this position, the propeller Napoleon came up the channel, passed to the northerly of the Muskingum, and ran into the Morton, striking her upon the port wheel nearly amidships, and doing her considerable damage.

Mr. *Geo. S. Swift*, for libellant, cited *Davies v. Mann*, 10 M. & W. 546; *The Batavier*, 2 W. Rob. 407; *Steamboat Co. v. Vanderbilt*, 16 Conn. 420; *Cummins v. Spruance*, 4 Harr. 315; *Brownell v. Flagler*, 5 Hill, 282; *The Girolamo*, 3 Hagg. 169; *Ralston v. The State Rights*, Crabbe, 22.

Mr. *Levi Bishop*, for claimant, cited *Flanders' Mar. Law*, 289, 299, 304; 1 Conk. Ad. 370; *The Genesee Chief*, 12 How. 461.

WILKINS, J. The channel of St. Clair flats, where the collision in this case occurred, navigable for vessels drawing ten feet of water, does not exceed 180 feet in width. There is some conflict in the testimony as to the exact position of the Morton, but I am satisfied she was not lying parallel or nearly parallel with the channel, as she could not in this position have worked to any advantage in getting the Torrent off. Bearing in mind that the length of the Morton was 165 feet, and the distance between her stern and the bow of the Torrent 30 feet, she would naturally assume a position, in getting off the Torrent, that would throw her so far across the channel that it would be impossible for a tug, drawing so much water as the Napoleon, to pass her to the northward. I am satisfied that such was the fact. Of course, too, it would be out of the question for the Napoleon to pass between the two vessels so long as the line was taut.

Evidence was given of a custom for tugs, while working at vessels aground upon the flats, to give way upon the approach of other vessels and permit them to pass. Considering the number of vessels using the narrow channel, and the frequency with which they ground there, I think that good seamanship and the interests of commerce require that tugs, in assisting stranded vessels, should obstruct the navigation of the channel as little as possible, and should yield a right

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of way to passing vessels, even if they are obliged to desist temporarily from their efforts. Had this course been pursued by the Morton in the present case, the collision would have been avoided. While it is true her failure to do this would not have justified the Morton in running her recklessly down, or in omitting the observance of ordinary care in approaching her, still her duty to give way, and the probability of her so doing, ought to be taken in consideration in determining what would be ordinary care under the circumstances—in other words the master of the Napoleon had a right to suppose he would conform to this well known custom, and to rely upon his observance of it, and would be excused from such precautions as would have been necessary had he known the Morton would not have given way.

As she approached the group of vessels in question, the Napoleon passed to the northward of the Muskingum, which lay nearly abreast of the Torrent, and a little to the northward of the centre of the channel, and as she passed her, her master hailed the Morton to stop his boat, back her, and let him go by. To this Captain Kimball replied, "No, go around me;" and when Capt. Pridgeon, of the Napoleon, again said, "I am drawing too much water, and can't go around you," he still refused to move, and continued working his engine ahead. Seeing then that a collision was imminent, "Capt. Pridgeon rang his bell successively to check, stop, back and back strong. This was immediately done, and the wheel of the Napoleon was working backward at the moment of collision. If the Morton had backed at once when requested, and opened a passage-way, as she ought to have done, the Napoleon would have passed her without injury. There was not sufficient water for her to pass either to the southward of the Torrent or the northward of the Morton, and they were thus obstructing the only available channel there was at that point.

Bearing in mind that as against the Morton the Napoleon had the right of way, I cannot see that there was any omis-

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sion of ordinary precautions on her part to avoid a collision, and she must therefore be exonerated from fault.

Libel dismissed.

NOTE.—See *The Thomas A. Scott*, post.

THE SULTANA.

MARCH, 1858.

AUTHORITY OF MARSHAL TO REPAIR.

The marshal has no authority, as such, to direct repairs to a vessel beyond what are necessary to her preservation while in his custody; but if repairs are furnished upon the order of the master, the fact that he was, without the knowledge of the libellant, holding the vessel as custodian for the marshal, will not prevent a lien attaching.

LIBEL for dockage and repairs. It appeared that the Sultana was brought to the dock about the 5th of December, A. D. 1856, and was taken in on the 8th under a contract between the master and the libellant. The remaining facts appear in the opinion of the Court.

Mr. *Wm. Gray*, for the libellant.

Mr. *J. S. Newberry*, for claimant.

WILKINS, J. There is no doubt that the contract in this case was within the scope of the master's authority, and that the dockage was necessary, within the meaning of the law. The vessel had been seized under process of attachment on December 1st, and at the time she entered the dock

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was in custody of the marshal, who had constituted Captain Appleby ship-keeper, to hold possession of the vessel while awaiting the further action of the Court. Appleby was known to libellant as master of the vessel; he was *not* known to him as the deputy of the marshal. He evidently made the contract with libellant as master, and not as ship-keeper, as he had no right to do so in the latter capacity. Tyler, the deputy marshal, who had made Appleby ship-keeper at his own request, took possession of the vessel himself on the 15th of January, while she was still in libellant's dock.

At the time the contract was made and the vessel entered the dock, libellant had neither actual nor constructive notice that Captain Appleby had any authority from the marshal to hold possession of the vessel for him. Such being the case, the Court will hold the vessel liable for the dockage and repairs furnished up to the 15th of January, when Tyler, the known deputy of the marshal, took possession of her.

From this time libellant had notice that the vessel was in the custody of the law, and the subsequent repairs furnished by him constituted no lien. It is not within the power of the marshal to contract for repairs that are not absolutely necessary to the preservation of the vessel while in his custody. It is his duty simply to keep the vessel as he receives her, and he has no authority to expend money for alterations or repairs for the purpose of completing her equipment for navigation.

The third and fourth items of libellant's account, amounting to \$1,750, are disallowed, and a decree granted for the residue.

Decree for libellant.

THE GEM.

MARCH, 1858.

WHARFAGE.—THE 12TH RULE.

Wharfage is the use of a wharf by a vessel for the loading or unloading of goods or passengers. Mere anchorage at a wharf is not wharfage.

The use of a wharf is not "material" for a ship, within the meaning of the 12th Rule, nor is a wharfinger a material-man.

The maritime law does not give a lien for wharfage.

THREE libels brought to recover for the use and occupation

(1) Of a wharf at the foot of Woodward avenue, Detroit;

(2) Of a private wharf fronting certain lots of libellants, in Detroit;

(3) Of a wharf on the opposite shore of Detroit river, in Canada.

Mr. *Alfred Russell*, for libellant.

Mr. *John S. Newberry*, for claimant.

WILKINS, J. At the commencement of the argument of this case, the proctor for the libellant abandoned all claim for the use of the Canadian wharf; and so far as the use of the wharf at the foot of Woodward avenue is concerned, the case was settled by that of *The Empire State* (1 Newb. 547).

The only matter left for the action of the Court on these libels is the claim for the use of the private wharf of libellant, by the Gem, for certain days in the years 1856 and 1857.

Wharfage may be claimed either upon an express or an implied contract: express, when a price is agreed upon for the use of the wharf, and implied, when used without such agreement. Strictly speaking, it is money due, or money actually paid for the privilege of landing goods upon, or loading a vessel while moored, from a wharf. The occupation, by

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anchorage or otherwise, of a navigable river open to all, in the vicinage of a wharf, implies no contract of wharfage, because it is no use of the wharf for either the landing or the reception of passengers or merchandise. Without determining the preponderance of the testimony as to the controverted fact, whether this wharf was or was not used by the Gem, I am necessarily compelled to adhere to the opinion given by this Court in the case of *The Asa R. Swift* (1 Newberry, 553), which, until reversed by the appellate Court, must govern. The law of that case has *not* been reversed. An appeal was taken from the decree of the District Court, and a stipulation filed, by which two legal propositions, embracing the merits of the case, were submitted to the Circuit Judge. The first was as to the extent of the lien conferred by the local law, and its enforcement *in rem* against a domestic vessel.

The second, whether the fact that the steamboat had left the wharf with no effort on the part of the wharfinger to detain her, and with full knowledge on his part, precluded a recovery *in rem*.

The case was argued on these propositions, at the session of the Circuit Court, in June, and held under advisement until the 5th of August, when the clerk of the Circuit was directed, by letter, to enter a decree reversing that of the District Court, without stating upon what ground, or wherein, the District Court had erred.

This is no reversal of the law as pronounced by the District Court, nor is it possible to ascertain on which proposition the reversal is based.

In *The Asa R. Swift*, it was held that the 12th Rule of the Supreme Court, having the force of a statutory provision, directed that "proceedings *in rem* shall only apply to cases of domestic ships where, by the local law, a lien is given to *material-men* for supplies, repairs or other necessaries."

The statute of Michigan gives a lien for wharfage, but the statute of the United States inhibits the proceeding in this Court, limiting the same to domestic vessels where, by

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the local law, a lien is given to *material-men* for supplies, &c., and to none others.

The District Court held :

1st. That the use of a wharf was not "material" for the ship.

2d. That a wharfinger was not a material-man. Neither of these propositions is denied by the Circuit Court.

3d. That the 12th Rule was obligatory as to the jurisdiction of this Court in such cases. This proposition is not overruled by the Circuit Judge in such clear terms as to warrant the application of such reversal to the facts of this case.

4th. Material-men are such as supply the materials for the construction or repair of vessels. A wharfinger cannot be so considered. He is only a lessor for the time being of a part of his real estate, to be used for moorage. He supplies the convenience of dockage and the facility of discharging passengers and freight, but no material for the use of the ship, within the spirit and intent of the statute. The appellate Court does not declare otherwise.

All we are able to learn from the brief minute of the Circuit Judge to the clerk is, that the decree is reversed, but no construction is given either to the local law or the statute of the United States. It is a reasonable presumption, that the appellate Court, ascertaining that the local law gave a lien for wharfage, at once applied it, without reference to the provision of the 12th Rule, as declaratory of the enforcement of such lien.

This Court will be guided by the decisions of the appellate Court; but, in order to apply those decisions to other cases, we must be satisfied that the law has been determined by the appellate power, as we cannot safely direct judicial action on mere conjecture.

The Gem was a domestic vessel, and therefore governed by the 12th Rule—the Court holding that the use of a wharf is not material supplied to a vessel, and that a wharfinger is not a material-man.

The facts, as viewed by the Court, would not have war-

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ranted a decree for the libellant, but I prefer placing the dismissal of the libel on the ground stated.

Libel dismissed.

NOTE.—I think the weight of more recent decisions is to the effect that wharfage is a maritime contract, and that a lien exists therefor, irrespective of the 12th Rule. This was probably the view taken by the Circuit Court in the reversal of *The Asa R. Swift*. See *The Kate Tremaine*, 5 Ben. 60; *Ex parte Lewis*, 2 Gall. 483; *The Phebe*, Ware, 360; *The McDonough*, Gilpin, 103. But see *Delaware River Storage Co. v. Bark Thomas*, 7 Am. Law Rev. 381; *The Alexander McNeil*, 20 Int. Rev. Rec. 175.

THE HAMILTON MORTON.

MARCH, 1858.

SUPPLIES BOUGHT FOR A VESSEL LYING AT A DISTANT PORT.

Where coal was bought for a tug, then lying at a distant port, by one who purported to be the master and owner, held that the seller was bound to ascertain the extent of the purchaser's authority, and the necessity for the purchase of the coal.

THIS was a libel for fuel furnished Oct. 27, 1857. It appeared, upon the trial, that one Isaacs, who held himself out as master and owner, ordered of libellants, at Cleveland, on Oct. 23d, 230 tons of coal, and, at Isaacs' request, the same was shipped by them, upon the schooner *Velocity*, consigned to the tug *Hamilton Morton*, at Algonac, Michigan, Isaacs representing that he purchased it for the use of the tug. It was shown to be customary for masters of steam vessels to purchase large quantities of coal at Cleveland, and have it shipped to various ports upon the lakes, for their use. The coal was sold upon the credit of the tug, and not upon that of Isaacs, who was known to be irresponsible.

It appeared, however, that Isaacs, though the owner, was not, in fact, the master; that, on Oct. 24, the day after the

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coal was ordered, and before it had all been shipped on the Velocity, the tug was seized by the marshal, at Detroit, for debt, and remained in his custody until she was finally condemned and sold. The coal was never actually delivered to the tug, nor unladen by the Velocity at Algonac, but was carried by her from Algonac to Detroit, where it was sold by Isaacs. It also appeared that the purchases for the use of the tug were usually made by one Robinson, her master, and that Isaacs paid little attention to her beyond collecting her bills.

Mr. *Wm. Gray*, for the libellants.

Mr. *W. A. Moore*, for the claimants.

WILKINS, J. The coal never was furnished the Morton. It was delivered by the libellants to the schooner Velocity, which was chartered by Isaacs, claiming to be the master and owner of the Morton, which, at the time, was actually in custody of the marshal of this District, and had been for four days previous thereto.

Should the Court decree in favor of the libellants, it must be entirely upon the very unsatisfactory testimony of Isaacs, which in its material facts, is contradicted by Robinson, who testifies that he was master of the tug until the close of navigation, made all her contracts, and, at the time Isaacs was negotiating with libellants, had purchased all the coal she needed while she was lying at Algonac.

Independent, then, of the question raised as to the lien under the Ohio law, the proof would not warrant a decree against the vessel.

The fact that, at the time the coal was ordered, the tug was lying at a distant port, should have put the libellants upon inquiry, and they were bound to ascertain the extent of Isaacs' authority, and to see that the coal was actually needed by the tug.

Libel dismissed.

The Fame.

THE FAME.

DECEMBER, 1858.

FORFEITURE.—DUTY OF DELIVERING MANIFEST.—UNLADING AND DELIVERY.

Where a vessel and cargo appears by her manifest to be consigned to an American port, parol evidence will not be permitted to control the intention so expressed, and to show that the cargo was, in fact, destined to a Canadian port.

Under the first section of the Act of 1821, the master of a vessel entering a port of the United States, with merchandise subject to duty on board, and consigned to such port, is bound to deliver his manifest, notwithstanding he may intend such merchandise to be returned to Canada.

The transshipment of a cargo from one vessel to another, while lying at a wharf in port, is an unlading and delivery within the meaning of the 50th section of the Act of 1799.

Innocence of an intent to defraud the revenue will not prevent a forfeiture where a violation of the statute is clearly proven.

INFORMATION for forfeiture.

The *first* count charged a violation of the first section of the Act of March, A. D. 1821, in that the bark, being an unregistered vessel, imported and brought into the port of Detroit, from the province of Canada, certain liquors subject to duty, without a manifest of the same being delivered by the master to the collector nearest to the boundary line, or nearest to the waters by which the liquors were brought, but that the master passed by and avoided the office of the collector at which the manifest ought to have been delivered, &c.

The *second* count was founded upon the 50th section of the Act of 1799, and charged that the same liquors were brought, by some person unknown, in the Fame, from a Canadian port to Port Huron, in the district of Detroit, and there unladen and delivered from her in the night time, without a license from the collector or other proper officer.

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The *answer* simply denied, in general terms, the allegations of the libel.

The liquors were taken on board at Amherstburg, Canada, and were manifested to Detroit, although they were not, in fact, intended for exportation, but were designed to be delivered at Sarnia and Goderich, in Canada. The Fame passed by Detroit without stopping, and arrived at Port Huron late at night, where the steamer Ploughboy was waiting to receive the liquors. Efforts were made to find an officer of customs at Port Huron who could give a permit, but, owing to the lateness of the hour, they were unsuccessful, and the liquors were transhipped from the Fame to the Ploughboy without authority, and by the latter carried to Sarnia and Goderich and unladen.

Mr. Jos. Miller, Jr., District Attorney for the United States.

Mr. Levi Bishop, for the claimant.

Our defence is simply that the goods were not *consigned* to the United States ; that they were not *imported* into the United States ; that there was no intention to import them ; they were not landed ; they were not, therefore, subject to duty ; and they do not, therefore, cause a forfeiture, and none has, in fact, taken place.

The facts are simple and are clearly proved.

The goods were shipped at Malden, consigned to another Canada port, but as the Fame only went to Port Huron, the instructions were to put the liquors on another boat, bound to the port of destination, which was done, and the goods were never, in fact, imported into the United States.

The following authorities bear on the subject :

A claimant may explain a *prima facie* case against him so as to show his innocence, and that there is no cause of forfeiture (*The Robert Edwards*, 6 Wheat. 187; *U. S. v. Nine Packages of Linen*, 1 Paine, 129).

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The construction of all revenue laws must be according to the *commercial sense* of the *terms* used in them, by Congress (*Lee v. Lincoln*, 1 Story, 610; *Bacon v. Bancroft*, 1 Story, 341; *U. S. v. 112 Casks Sugar*, 8 Peters, 277; *Curtis v. Martin*, 3 Howard, 106).

The mere *transit*, on our side of the line of a boundary river, if not done with the intent to *import* the goods, is not a cause of forfeiture (*The Apollon*, 9 Wheat. 362; Conk. Treat. 326).

To make an *importation* complete, there must be an arrival at the port of entry with an intent to unload the goods there (*U. S. v. Lindsey*, 1 Gall. 365; *U. S. v. Lyman*, 1 Mason, 482, 492).

By *importation*, is to be understood bringing goods into port *with intent to land* them (*U. S. v. Voicell*, 5 Cranch, 368; *The Schooner Mary*, 1 Gall. 206; *U. S. v. Arnold*, 1 Gall. 348; *Prince v. United States*, 2 Gall. 204; *Perot v. United States*, 1 Peters C. C. R. 256).

The revenue laws relate solely to goods *imported* into the country for *trade, sale and consumption* (*The Gertrude*, 3 Story, 68).

Merely bringing goods into the country for a *temporary purpose*, with the intention of returning with them, and without any intention to *import* them, does not occasion a forfeiture (*U. S. v. One Sorrel Horse*, 22 Vt. 655).

In this case the goods were not merely put on another ship, without landing them, and sent forward, but the goods were landed and actually used a long time in this country.

To occasion a forfeiture, a *clandestine importation*, or a *fraudulent smuggling traffic* must be intended (*The Schooner Boston*, 1 Gall. 239; *The Forester*, Newberry R. 82).

Now I presume this seizure is made pursuant to the Act of March 2, 1821, sec. 1 (Conk. Treat. 322, 323; 3 Stat. at Large, 616).

So that in order to establish the forfeiture, the goods must have been *subject to duty*, under the act of July 30, 1846 (9 Stat. at Large, 42).

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That Act imposes duties on *imported* goods alone (same authorities).

But these liquors were not *imported*. They were not intended for the United States; they were not consigned here; they were not landed here for any purpose; and in short, they were not *imported*; they were not, therefore, subject to duty; there was no forfeiture, and we ought to be dismissed.

The good character of the claimant, and also of the owner of the liquors, go far in such a case (*U. S. v. Nine Packages of Linen*, 1 Paine, 146).

And it cannot for one moment be supposed that Mr. Bagg, or Mr. McLeod, intended to incur the heavy penalties of a clandestine importation.

Such a supposition becomes supremely absurd, in view of the testimony that these same liquors are worth double in Canada what they are here. We ask credit for a little common sense on this subject.

The act of 1821 was repealed by the act of 1831, so that the case cannot stand. This is clearly Mr. Conklin's opinion (Act of 1821, 3 Statutes at Large, 616; Act of 1831, 4 Statutes at Large, 487, sec. 3; Conk. Treat. 327, 330, 331).

The foregoing argument was prepared on the original libel, which was founded on Sec. 1 of the Act of 1821.

Since then an amended libel has been filed, containing a count on the same section of the Act of 1821, and a second count on Sec. 50 of the Act of 1799 (1 Statutes at Large, 665).

It becomes necessary, therefore, to say something on this latter count.

We insist that the case does not come within the letter or spirit of the Act of 1799.

That statute does not contemplate a mere *transit* of goods which chanced to be temporarily in the waters of the United States, but which were not consigned or destined for the United States, and which were not landed or *imported* for *trade, sale*, or any other purpose (see authorities above cited).

The Act of 1799, as expressed in its title, was intended to

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regulate the *collection* of *duties* on *imports*, tonnage, &c. (1 Statutes at Large, 627).

This character is imparted in every section. And it clearly did not have reference to goods not landed, not imported and not destined for the United States.

The amendatory Act, also, of 1821, is expressly, "further to regulate the entry of goods *imported* into the United States" (3 Statutes at Large, 616; Conklin Treat. 322, 320).

So also the Act of 1823, further amendatory, has the same title and object (3 Statutes at Large, 729; Conklin Treat. 320).

Such is the scope of all these Acts, and many other like Acts of Congress. They all look to *duties* on *imports*, which must be regarded as their whole object.

And such only must be regarded as the object of section 50 of the Act of 1799, on which the second count is based (1 Statutes at Large, 665).

In construing statutes, the text, context, object, scope, and spirit must all be regarded.

The *unloading* and *delivering within the United States*, without a *special license* from a *collector*, of goods brought in *any ship* from any *foreign port* or place, must, in order to constitute a forfeiture, be of goods *imported*, or intended for *importation*. A different construction would work great injustice, and cannot have been the intention of Congress (sec. 50).

Congress meant goods *imported* or *delivered* at the port of *destination*, and they did not mean a mere transfer from one carrier, or one mode of conveyance to another, of goods in *transit* from one Canadian port to another.

Such are clearly Mr. Conklin's views (Conklin Treat. 326, 327).

And I think that the course of reasoning and the authorities, before applied to the first count, apply also to the second.

WILKINS, J. I regret the necessity of condemning the Fame, but the statute is imperative. The *first* count is based upon the 1st section of the Act of 1821, and the facts clearly

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establish a violation of its provisions. The Fame sailed from the port of Amherstburg, in Canada, bound for Detroit, with 200 barrels of whisky, ten kegs of gin and five of brandy, all of Canadian manufacture, and failed to deliver her manifest to the collector at Detroit, where the nearest customs office was located. The excuse is that the liquors were not intended to be imported into the United States, but were designed to be transhipped into another vessel bound to a Canadian port. Of this intention I have no doubt; yet the master was bound to deliver his manifest when lying at or off the port. Such merchandise was subject to duty, had an importation been intended, and from the "Report Outwards," signed and verified by the master at Amherstburg, it appears the vessel was consigned to Detroit. As no other destination is mentioned for the liquors, they must be presumed to have been consigned to the same place. Foreign liquors are subject to duty; and although this freight was clearly intended elsewhere, yet such intention proved by oral testimony, contrary to the ship's papers, cannot be admitted as an excuse for a palpable violation of the statute. It would open the door to a vast amount of fraud upon the revenue.

But had I any doubt as to the 1st count, the *second* is sustained beyond all question. The cargo is of greater value than \$400, and the proofs establish the fact that she was unladen within the United States, at midnight, without license or permit. I say unladen, for the steamer Ploughboy was lying at the dock at Port Huron, where the Fame transhipped her cargo. It is contended that this transshipment is not an unloading within the meaning and spirit of the 50th section of the Act of 1799. It is true the cargo was not landed in the literal sense of the word—*i. e.*, placed on shore—but it was taken from one vessel to the other while both were in port. This was clearly a landing within the intent of the statute, which was designed to prevent frauds upon the revenue. It was easy for the master to procure a permit, and thus save his

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owners from this prosecution. But the Court cannot make the law bend to the convenience of masters.

Decree of condemnation.

NOTE.—For definition of importing and entering a port, see the following recent English cases: *The Bahia*, Brown & Lush. 61. *The Pieve Superiore*, 2 Asp. Mar. Law Cases, 162. *The Ironsides*, Lush. 458. *The Danzig*, Bro. & Lush. 102. *The Patrie*, L. R. 3 Ad. & Ec. 437, 439.

THE PLOUGHBOY.

FEBRUARY, 1859.

REVENUE LAWS.—RECEIVING GOODS UNLADEN WITHOUT PERMIT.

Under section 28 of the Act of 1799, the reception by one vessel of goods unladen from another without a permit, subjects the receiving vessel to forfeiture irrespective of a fraudulent intent on the part of her officers.

The fact, that efforts were made to find an officer, which were unsuccessful on account of the lateness of the hour, and that the master was impatient to proceed, furnish no legal excuse.

INFORMATION under the 28 section of the Act of 1799, for receiving a quantity of Canadian liquors from the bark Fame, while lying moored at Port Huron, without a permit from an officer of the customs.

The facts of the case appear in the opinion of the Court.

Mr. *Joseph Miller*, District Attorney, for the United States.

Mr. *Levi Bishop*, for the claimant.

WILKINS, J. The charge embraced in the first and second counts of the information is clearly established by

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the proofs. It is in substance that after the arrival of the Fame at Port Huron, the goods were unladen from her without license, and were put on board and received into the Ploughboy, Port Huron not being the proper place for the discharge of the cargo of the Fame.

Section 28 of the Act of 1799, must be construed in connection with the preceding section, and consequently inhibits under penalty of the forfeiture of the vessel, the reception of the cargo by and into any other ship before reaching her port of destination. Port Huron was not such port. The cargo was transferred from one vessel to the other at midnight, without authority or permit.

By the written admission on file, it appears the bark Fame left the port of Amherstburg, Canada, with a cargo of whisky, brandy and gin, of Canadian manufacture, bound as appears by her manifest for the port of Detroit. The manifest or "report outwards" duly authenticated by the British collector, simply shows the fact that the bark Fame with her cargo left for Detroit on the day mentioned. She passed Detroit without reporting, pursuing her course up the river to Port Huron, and there moored at the dock and waited for the Ploughboy. On her arrival, the cargo of the Fame was transhipped and received on board the Ploughboy, and by her taken to and discharged at Port Sarnia in Canada, nearly opposite Port Huron. The Ploughboy was a British vessel running between Detroit and Goderich in Canada, occasionally stopping at Port Huron and Sarnia. The owner of the liquors was also the owner of the Ploughboy, and kept liquors for sale both at Goderich and Sarnia, and I have no doubt from the testimony, that the liquors were intended to be consigned to the Canadian ports, and were not designed for the United States. But such intention was not expressed in the manifest—an omission resulting from the obvious design of the consignee to have them transhipped to his own vessel, which was expected to meet the Fame on the British side of the channel.

It was admitted that the Fame delivered no manifest at

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Detroit, her port of destination, and it is in proof, that after her seizure at Port Huron it was, by the deputy collector there, transmitted by mail to the collector at Detroit. The letter of the law then was clearly violated by the Ploughboy, there being no permit to unlade the Fame and receive her cargo, from any officer of the customs, and the language of the statute is so positive that notwithstanding the apparent lack of a fraudulent intent, I must reluctantly direct a decree of condemnation.

The law prohibits the reception of goods by one vessel from another, before reaching the port of destination, without a permit or license. The officers of the Ploughboy knew the necessity of a permit, and endeavored to find a custom-house officer, but were unable to do so on account of the lateness of the hour. The statute declares that the cargo of no such vessel shall be unladen or received into any other ship for any purpose whatever, without the specified authority. This excludes the defense of innocence of intention. The impatience of her officers to proceed on their way, cannot be embraced by judicial construction in the exception of the statute as to accident or necessity. If no officer could be found at that late hour, it was the duty of the master to wait until morning.

The evidence of an understanding with the former collector cannot be recognized by the Court as modifying the statute, although it certainly is an excuse addressing itself to the clemency of the government for a remission of the forfeiture.

The evident consignment of the cargo to Sarnia—the design to tranship for that purpose, the supposed arrangement with a former collector as to arrivals and departures at Port Huron, the arrival of the Ploughboy in the night time on her trip to Goderich—the search for the officer at midnight, in order to procure a permit, tend strongly to acquit the master of any intent to violate the law, but furnish no legal basis for an acquittal under the provisions of the statute.

Decree of condemnation.

NOTE.—The forfeiture decreed in this case, was afterwards remitted upon payment of a fine of \$200 and costs.

The Mermaid.

THE MERMAID.

FEBRUARY, 1859.

REPAIRS.—LAW OF CANADA.

There being no lien by the local law for repairs furnished in Canada, no proceeding *in rem* can be maintained here to enforce the payment of such repairs.

THIS was a libel for repairs furnished to the schooner Mermaid, at the port of Amherstburg, in the province of Canada West. It was admitted, by stipulation, that the vessel was a Canadian bottom, owned in Canada; that there was no local statute of that province giving a lien to material-men, and that the contract for the repairs was also made at Amherstburg.

Mr. *J. S. Newberry*, for the libellant.

Mr. *D. B. Duffield*, for the claimant. •

WILKINS, J. By the Constitution of the United States, its judicial power extends to "all cases of admiralty and maritime jurisdiction;" and it is contended, by the counsel for libellant, that this language embraces the general maritime law of continental Europe, unrestricted by the rulings of the English courts limiting admiralty jurisdiction to the ebb and flow of the tide; and that, by this general law, which, as part of the law of nations, is recognized in Canada, the fact of making the repairs of itself created a lien upon the vessel enforceable in this court. I cannot so rule. The Mermaid, was a foreign vessel in the port of Detroit, and liable in this Court for supplies furnished here, yet if no lien attached at her home port, where the contract was made and performed, none can be enforced here. The law of England covers her provinces, unless changed by provincial statutes; and there

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being no local law giving this lien, and no ebb and flow of the tide bringing the waters of the lakes within the jurisdiction of the Admiralty, as interpreted by the English Courts, there was no lien existing against the vessel.

Libel dismissed.

NOTE.—It will be observed that the *Mermaid* was a Canadian bottom, consequently the case presents the ordinary feature of repairs furnished in a home port, for which there was then confessedly no lien, under the decision in the case of the *General Smith*. Had the *Mermaid* been an American vessel, the question might have been one of greater difficulty (see *The Avon, post* ; *The Champion, post*).

THE SUMNER'S APPAREL.

FEBRUARY, 1859.

SALVAGE.—DUTY OF SALVORS.—FORFEITURE.—EMBEZZLEMENT.

In stripping an abandoned vessel of her apparel and furniture, salvors are bound to the exercise of reasonable care, and gross neglect or wanton injury of the property saved works a forfeiture of all claim for salvage, and renders them liable for the damage.

It is the duty of salvors to land the property saved at the nearest port of safety, and see that it is properly cared for.

Where salvors stripped a vessel, having her name and port painted on her stern, and carried the property saved directly past her home port: *Held*, they were guilty of embezzlement, and forfeited their right to compensation.

LIBEL for the possession of two anchors and chains, a set of sails, and running rigging, being part of the outfit and apparel of the schooner *Charles Sumner*.

ANSWER by the officers and crew of the schooner *Norway*, that on a voyage from Buffalo to Milwaukee they discovered the *Sumner* upon Lake Erie, about 25 miles from Pte au Pelée, in distress, on her beam ends, and apparently deserted.

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On boarding her, they found her loaded with staves, but capsized and full of water. They made fast to the wreck, and by means of hawsers from the mast-heads, made fast to those of the wreck, righted her, and endeavored to pump her free of water, and to lighten her by raising her chains, and removing same, with her anchors on board the Norway; but, failing in this, stripped her of her tackle, apparel, and furniture, put them upon the Norway, and carried them to Newport, upon St. Clair river, where they were seized by the marshal. That immediately thereafter they filed a libel for salvage against the property, and they now claim they are entitled to a reasonable salvage thereon.

Libellants thereupon filed an amendment to their libel, under Rule 52, in the nature of a replication, setting forth that the officers and crew of the Norway had embezzled the property, and were endeavoring to carry it out of the district, when it was seized by libellants' instructions. That they were also guilty of gross negligence in removing the property from the vessel, and in the subsequent care of it, permitting it to be stolen and wantonly injured.

The Charles Sumner left Detroit upon a voyage down Lake Erie; off Roudeau she commenced leaking, and, notwithstanding the exertions of the crew, filled with water and capsized. The crew thereupon took to their boats, came ashore, and went to Detroit for a tug, which was obtained and sent to her assistance. Her name and home port, "Detroit," were painted upon the stern of the Sumner. In reaching the wreck it was found stripped of everything movable; her rigging had been cut in some seventy places, her canvas torn, and her blocks split and otherwise damaged. There had been fine weather for several days before. The schooner could have been towed easier with her sails and rigging than without them, and there seemed to be no necessity for stripping her. The Norway had been seen a day or two before working at the wreck, but she made no signal for assistance; and, after lying by her from three in the afternoon until four the next morning, left her. When the tug found her she was

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easily bailed out, and towed to a port of safety. The Norway had passed by Detroit with the property on board, and was seized on the way to Lake Huron. The rigging of the Sumner was found so badly cut and abused as to be nearly worthless, except for junk.

Mr. *Alfred Russell*, for libellants.

Mr. *Ashley Pond*, for salvors.

WILKINS, J. I am satisfied from the proofs, and especially from the testimony of Wm. McKay and James McBride, master of the Sumner, that the officers and crew of the Norway are not entitled to salvage, under all the circumstances exhibited. The Sumner was not derelict. Her master and crew left her for the purpose of obtaining a tug, *animo revertendi*. The crew of the Norway, without rendering any assistance, unnecessarily destroyed and injured the furniture and rigging of the Sumner, left her exposed to thieves and marauders, and used no efforts to place her in a safe position. Their conduct showed a disposition to plunder rather than to save. The Norway was on her way to Chicago, and yet, knowing from the name and port painted upon the stern that she belonged to Detroit, surreptitiously passed that port with the valuable apparel and furniture of the Sumner on board. Her duty, even if the name of the vessel relieved was unknown, was to stop at the first port of safety, and see that the property she had on board was properly cared for. By not doing so her master and crew showed clearly an intention to embezzle the property saved, and thereby forfeited all claim to salvage. The property described in the libel will, therefore, be delivered to the libellants, who are also awarded damages in the sum of \$200, with costs.

Decree for libellants.

NOTE.—That misconduct of salvors forfeits their claim, see *The Mulhouse*, 22 Law Rep. 276; *The John Perkins*, 19 Do. 490; *The Island City*, 1 Black, 121; *The Boston*, 1 Sum. 329; *Mason v. The Blaireux*, 2 Cranch, 240; *Flinn v. The Leander*, Bee, 260; *The Sarah A. Boice*, 2 Int. Rev. Rec. 45.

The Kaloolah.

THE KALOOLAH.

MARCH, 1861.

PRACTICE.—PETITION TO SET ASIDE SALE.

A vessel, bought with the money of C., was enrolled in the name of M., as owner and master, he agreeing to hold her in trust for C. until all his advances had been repaid. While in the hands of M., who was navigating her for charterers, she was attached, condemned, and sold at marshal's sale, without the knowledge of C., and was bid in by the charterers. Upon learning of the sale, C. came into Court, filed his petition for the remnants, and six weeks afterwards withdrew this, and filed another praying that the sale and decree of condemnation might be set aside, and he permitted to intervene and defend. The vessel in the mean time had been delivered to the purchasers, who had taken her to Canada and repaired her, and the claims upon which she was libelled had been paid. Petition denied.

A simple allegation of fraud in a petition to set aside a sale, without setting forth the facts which constitute the frauds, is insufficient.

On petition of Hector Cameron, of Toronto, Canada, that the sale of the Kaloolah be set aside; that certain decrees, upon which she had been sold, be vacated, and that he be permitted to intervene and defend. The petition set forth that prior to the seizure of the Kaloolah, she was enrolled at the port of Detroit, in the name of one McGregor, who was her owner, but that she had been originally purchased with petitioner's money; that he also expended large amounts of money for her outfit, under an agreement with McGregor, that he should have a lien for all moneys so expended. That in January, A. D., 1859, McGregor had executed to petitioner a declaration reciting the above facts, and agreeing to hold the vessel in trust, for petitioner, until these advances had been repaid, and empowering petitioner to sell, mortgage, or otherwise dispose of her as he might see fit, McGregor also depositing with petitioner her original certificate of enrollment. That she continued in possession of McGregor, who navigated her under the directions of petitioner until July, when she was

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chartered to Van Every & Rumball, of Goderich, Canada, for the residue of the season, and that she continued to run in their employ, McGregor continuing as master until the close of navigation, when she was laid up at Saginaw, Michigan. That in October, 1859, she was libelled by one Wilson, for repairs put upon her; that immediately upon her seizure, Van Every & Rumball paid to the marshal the amount of the claim, but continued to prosecute the suit for their own benefit. That petitioner was informed the suit had been settled, and did not learn of its further prosecution until after the vessel had been sold. That McGregor, the legal owner, was taken sick soon after the commencement of the suit, and died on Jan. 3, 1860. That petitioner was not informed of the contemplated sale until the day it took place, when he at once telegraphed to Detroit to have it postponed, but his message did not reach there until two hours after the sale had taken place. That he came to Detroit, on Jan. 1, 1860, and there learned that she had been sold, and that Van Every & Rumball had become the purchasers at less than one-half her fair value, and less than they had offered him for a half interest. That the sale to Van Every & Rumball was fraudulent and void, for the reason that they had kept the contemplated sale concealed from petitioner; had caused the suit to be prosecuted for their own benefit, after the claim had been paid, and in violation of their charter party, had failed to redeliver her as they should have done. That after the sale, petitioner was informed that intervening libels had been filed against her, upon claims, some of which were not liens, and of the justice of all of which he was wholly ignorant. That among the rest, Van Every & Rumball had themselves obtained a decree for \$2,085, upon a claim unjust in point of fact, and which did not constitute a lien as matter of law.

The petition closed with a prayer that the sale might be set aside; that all the decrees might be opened, and petitioner might be permitted to appear and contest them.

Van Every & Rumball interposed an exception to this petition in the nature of a general demurrer; also claiming that

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petitioner was concluded by his delay ; that he did not offer to pay into Court the amount paid for the Kaloolah upon the sale ; that the steamer had been removed from the jurisdiction of the Court, and that the greater portion of the purchase money had been paid to the libellants, most of whom were residents of Canada, as appeared from the record of the case.

Mr. H. D. Terry, for petitioner.

Mr. W. A. Moore, for respondents.

WILKINS, J. Libels were filed against the Kaloolah, in October, 1859, for supplies and materials. At this time, one J. C. McGregor, now deceased, was her master and owner, and as such, he was cited to appear and answer these libels. All the proceedings in the case, from the service of the process to the confirmation of the sale are perfectly regular and unobjectionable. The vessel sold for upwards of \$5,000. An order of distribution was made. All the claims on file were paid, leaving a surplus in the registry of more than \$2,000.

On the 30th of December, two days subsequent to the confirmation of the sale and order of distribution, Capt. McGregor filed his sworn petition, alleging his sole ownership, and claiming the surplus proceeds. Two days afterwards he died at the Marine Hospital in this city. The second day following his death, the petitioner, Cameron, came into Court, and without objecting to the sale or confirmation, asked leave to file his petition for the surplus proceeds. Time was given him, and subsequently at his request enlarged, to prepare such petition, without the slightest intimation on his part of any intention to disturb the sale. The whole proceedings had been terminated by the final decree of this Court ; the vessel had passed into the possession of the purchaser, and all the purchase money, except the surplus in the registry, had been distributed among the several libellants. Of all these facts the petitioner had knowledge. Now, unless there was fraud or collusion between McGregor and the purchaser at the sale, the Court could not at this late day entertain a motion to set aside and annul these proceedings.

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The petition of Cameron represents him simply as a creditor of McGregor, having a lien upon the vessel. It concedes the important fact that McGregor was the legal owner, and that the Kaloolah was enrolled and licensed for the coasting trade at the port of Detroit, and in conclusion, abandons his claim upon the remnants, and prays that the sale and all the other proceedings had in the case be set aside, and he, as part owner, be admitted to contest claims which had been allowed and paid more than a month before.

To this petition exceptions were filed by the proctor for Van Every & Rumball, which I consider well taken.

A simple allegation of fraud in a petition to set aside a sale, without setting forth the facts which constitute the fraud, is not sufficient to justify a postponement for proofs. The facts and circumstances of the collusion must be alleged, in order to enable the adverse holder of the property to meet the allegation. Such is not the case here. The petition admits the ownership of McGregor, but alleges that petitioner made certain advances, with the understanding with McGregor, that they should be considered a part of the price to be paid for the vessel, and because the vessel was libelled and seized at an American port for materials and supplies, and because the owner was unable to make any defense, or pay the claims, therefore there must have been fraud and collusion between the master and owner on the one part, and the purchaser on the other. Cameron was not known as an owner of this vessel at the time these proceedings were had. He was not entitled to notice, except as all the world is entitled. The master was the owner of record, and actually in command at the time she was seized. If Cameron had been sole or part owner, notice to McGregor would have been notice to him. Even if he had had a maritime lien for his advances, such claim would have had no precedence over claims for materials and supplies. But it does not appear that he had such lien. Assuming the allegations of the petition to be true, he was a creditor not of the vessel, but of its master and owner—in *personam*, not in *rem*.

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In the case cited by the proctor for petitioner, the owner of a vessel caused her to be sold in Admiralty, and bid her in himself, having obtained a decree of condemnation for the sole purpose of defrauding lien holders.

In this case, however, Cameron does not deny that the claims which have passed to a decree are just and honest debts, with the single exception of that of Van Every & Rumball, and as to this, he does not deny the existence of the debt, but merely doubts the accuracy of the amount claimed. Yet, if he had been the actual owner, and McGregor had not been, they were equally valid against the vessel, and there was no fraud in McGregor conceding their justice, and not resisting their payment.

As already stated, I am satisfied the exceptions are well taken, and even if there were doubt, in a technical point of view, I would hesitate long before granting the prayer of the petitioner, or consenting to any further delay in the determination of the case. The tactics of the petitioner are altogether inexcusable. He knew the facts on the 3d of January, when he filed his petition for the remnants, as well as upon the 16th of February, when he filed his present petition. He first sought the registry for relief. Had his claim been just, it would have been decreed to the full amount of the surplus proceeds, and if his claim be a just one, he is not now remediless.

Petition denied.

THE LYON.

MARCH, 1861.

NEGLIGENT TOWAGE.—COLLISION.—VESSEL AT ANCHOR.

Where a number of vessels, connected by long lines, are towed astern of a tug, they are to be considered as under the government and control of the tug,

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and for any damage done to them, by the want of ordinary care on her part, the tug is responsible.

A tug coming down a river one mile in width, and encountering a vessel anchored upon the windward side of the channel, was held in fault for not passing the anchored vessel to leeward, it appearing that about three-fourths of the navigable water was upon that side.

ACTION against the tug Lyon and her master to recover damages done to the schooner Tom Dyer, by a collision with the brig Hollister.

The libel averred that, in November, 1859, the captain of the tug contracted with Richard Stringham, the master of the schooner Tom Dyer, to tow her from Lake Huron to Lake Erie, for the usual compensation; that, in pursuance of said contract, his vessel was attached to the tow of the Lyon, and placed under her control and guidance; that she was not towed safely, but that, through the negligence and fault of the master and crew of the Lyon, she was brought into collision with the brig Hollister, a vessel lying at anchor in Lake St. Clair, suffering damages to the amount of \$130.

The answer admitted an agreement to tow, denied any special agreement to tow safely, admitted the collision alleged, but denied it was occasioned by the fault of the tug.

Mr. John S. Newberry, for libellant.

Mr. W. A. Moore, for claimant.

WILKINS, J. The brig Hollister was at anchor in the river St. Clair, and, so far as the proof indicates, near the middle of the channel, but nearer the western than the eastern shore of the river, which was stated to be about one mile in width at the place of collision.

The answer admits that the Tom Dyer had her master and full complement of men on board, but charges that the collision occurred entirely from the negligence of her master and crew.

The case involves the construction of the contract of towage, which certainly, whether expressed specially or not, im

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plies that the vessels in tow are for the time under the government of the master and crew of the tug, and that ordinary care and diligence on the part of the latter will be used to avoid any injury to the vessels in her charge.

There may exist circumstances under which the vessel in tow may be in fault, as where she disobeys the orders of the tug, or recklessly throws herself out of line; but, as a general rule, the ship in tow is under the direction of the tug, and if obedient, and a collision occurs, the latter must be held responsible for the damage. In the *Duke of Sussex*, 1 W. Rob. 270, the action was *in rem* against the tug. The defense was, that at the time of the collision, the tug was towing the vessel under the direction of a pilot on board the vessel. It was held, by Dr. Lushington, "that if the orders of the pilot were obeyed, the owners of the vessel were not responsible; but otherwise, if they were not obeyed." Because, as the same learned judge declared, in the *Gipsy King*, 2 W. Rob. 537, where the action was brought against the vessel towed, "a vessel in charge of a licensed pilot, although under the tow of a steamtug, is to be considered as navigated by the pilot, and not by the tug." "But otherwise, when the navigation is controled by the steamtug, which is, of course, liable for negligence, or want of ordinary skill or care. A steamer towing a sail vessel has the wind free, and the vessel towed is under her control and guidance."

I, however, cannot coincide with the opinion of Judge Kane, in the case of the *Steamboat Superior*, decided in the Eastern District of Pennsylvania, and hold tow steamboats common carriers as to the vessels they have in tow. The contract is one of mere transit pilotage, and not of freight or carriage. The occupation of the common carrier is to carry at all hazard; the business of the steamtug is simply to afford the advantage of steam power to sail vessels wind bound. The contract, nevertheless, does demand seamanship, knowledge of the navigation and the obstructions of the river, usual vigilance, sufficient and competent force, the necessary lookout and lights; and the want of either will

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necessarily place the tug in fault, and render her liable for all damages.

The two important facts being conceded, namely: 1st. That there was a contract of towage; and, 2d. That there was a collision, the only question remains, was the tug skillfully managed, and did she employ ordinary diligence and care?

From the examination I have given the testimony, I cannot but consider the management of the Tom Dyer blameless.

She had her full complement of men, and followed the course and direction of the tug, which was running a W. S. W. course, heading on to the light-house on Hog Island.

This is proved by Stringham and West, and uncontradicted but by the engineer of the tug, whose occupation renders his testimony somewhat untrustworthy, when opposed to that of the captain and mate of the schooner. It is also in proof that the course pursued would bring the vessels near the American Channel bank. The position of the Hollister then becomes of great importance. If she was out in the lake, where there was ample space to pass to the eastward and no risk, and yet so near the west bank as to make the attempt to pass on that side hazardous, the tug must be held in fault. It would not be good seamanship to attempt to pass to the windward of a vessel anchored near the shore, with a tow of vessels, when there was abundant space to the leeward. But if the Hollister was anchored in the middle of the channel, at that point a mile in width, it would be optional to pass on either side.

In cases of this description, *ex necessitate*, great reliance must be placed on the testimony of experienced navigators, acquainted with the course and points of the river, who are present and give attention to the trial and evidence. Their opinion is of great weight and consideration, but not always controlling. These witnesses state that, coming down the river with a tow, when it is uncertain whether a vessel in sight is at anchor or not, the best course is to give her her own side,

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which was, as the court understood these witnesses, the American side of the brig. Captain Dailey, a witness called by the libellant, is still more explicit on this point, and having heard the testimony as to the course of the tug, he says "he should, under all the circumstances, have taken precisely the same course, and gone to the starboard or westerly side of the brig, just as was pursued by the tug." But neither of these gentlemen pass upon the propriety of going to the leeward of the brig, where there was ample space and unquestionable safety.

If three-fourths of the channel was on the leeward side of the brig—and that fact is fixed by the preponderance of the testimony—the leeward side of the brig was the right course in towing these three vessels, 250 feet apart, because from the wind and drift a collision with the Hollister was at least a possible occurrence.

Moreover, there was not a competent crew for the management and conduct of so important a towage. A captain, a pilot and a wheelsman do not come fully up to the strict requirements of law. There was no lookout, unless the master was such.

The Supreme Court has held, in *Steamboat New York v. Rea*, 18 How. 225, "that a trustworthy and constant lookout, so stationed as to obtain accurate information as to vessels ahead, and whose special business is to perform that duty, is essential to all steamers traversing waters where sail vessels are often met with, and the omission would be *prima facie* evidence of fault on the part of the steamer."

The captain or the pilot may perform these duties, but in case of collision it would become necessary to prove clearly that this duty was strictly performed. That they might have passed the brig safely in the course they took, is unquestionable; that they did not, is proved; that a constant lookout would have discerned in time the safest course, is likewise unquestionable; and for such a fault the tug should certainly be responsible.

The towage of vessels through our rivers in the northwest, connecting our interior seas, and so intimately associated with our trade and commerce, is a most important branch of mari-

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time service. Public policy requires that these tugs, although not common carriers, should be held by Courts to a strict accountability. Here, although experienced navigators give it as their opinion that the course taken by the tug was a right course, was there not under all the circumstances, the wind and drift considered, another and safer course to the leeward side of the brig? The wind was from the northwest, blowing across the river, and the natural tendency was to drift the tow into perilous proximity to the vessel at anchor. I cannot consider this as manifesting ordinary care or vigilance on the part of the master of the tug.

Cutting the line by the Tom Dyer might have saved her, but the omission to do so does not exonerate the tug, if her fault brought the Tom Dyer into such perilous position.

The tug led the line, the Tom Dyer obediently followed. The tug, as the pilot of the tow, must have observed the position of the Hollister, and her relation to the shore before she passed her. What, then, would sound judgment dictate? There could be no danger by passing to the leeward; there must have been doubt, at least, as to the westerly course, considering the wind and drift; and disregarding that doubt was a want of ordinary care that places the tug in fault, and makes her liable under her contract.

The damage resulting from the collision was not considerable, the pecuniary amount involved of small magnitude, but the principle to be established is of great importance to our interior navigation.

Ordinary care is the application of a sound judgment to the surrounding circumstances, and a tug, as a pilot, will be deemed in fault in going between a vessel at anchor and the shore, when the wind and drift makes the leeward side the safest course.

I do not consider this opinion as adverse altogether to that of the experts, in whose judgment I have great confidence, but I feel bound, by every obligation of duty, to hold that in cases of this description, where two courses are open, that is to be selected which is the less perilous to the vessels in tow.

Decrees for libellant.

CIRCUIT COURT.
DISTRICT OF MICHIGAN.

HON. JOHN McLEAN,
ASSOCIATE JUSTICE OF THE SUPREME COURT.

THE BUCKEYE STATE.

JUNE, 1857.

PRACTICE.—DEPOSITION.

A deposition, entitled in the District Court, but not received by the clerk until after the trial there, and not sent up as a part of the record of that court, cannot be read on appeal.

On motion to suppress deposition. The cause was tried in the District Court at Detroit, on the 8th day of December, A. D. 1856. On the same day the deposition of one McChesney was taken in Chicago, but did not reach Detroit until December 10th—too late to be read on the trial. On the case being appealed, the clerk made a memorandum on his transcript of the receipt of the deposition, and sent the same unopened to the clerk of the Circuit Court.

Mr. *John S. Newberry*, for claimant, moved to suppress the deposition:

(1) Because not taken in the Circuit Court, or in any cause therein pending.

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(2) Because the same was not read on the trial of the cause below, nor a transcript of the same returned to this Court.

Mr. *Levi Bishop*, for libellant.

McLEAN, J. As the deposition did not arrive until after the trial in the District Court, and was not in evidence there, it cannot be read as a part of the record of that Court sent here on appeal. Not being taken, or entitled in this Court, it cannot be considered as evidence taken on appeal. The motion must be granted.

Deposition suppressed.

LIVINGSTON v. PRATT.

JUNE, 1857.

PRACTICE.—SUPPRESSION OF DEPOSITION.

Though a deposition be taken under a stipulation waiving "all objections as to the form and manner of taking," it must still be returned to Court in all respects, as provided by law.

Where a deposition so taken was left for several months in the hands of defendant's attorney, and was not placed on file until the morning of the trial, it was held it could not be read.

MOTION to suppress a deposition. On the 3d of July, 1856, by stipulation between the parties, it was agreed that the testimony of one Whittemore might be taken before a United States Commissioner, "subject to all legal objections for irrelevancy and incompetency, but all objections as to the form and manner of taking being hereby waived, and that said deposition may be used as evidence on the trial of this cause, as if regularly taken under the Act of Congress." The deposition was taken on behalf of the defendant.*

* It was indorsed as follows: "I certify that, on the 18th June, 1857 (the

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Upon the motion the affidavit of the plaintiff's attorney was read, to the effect that he had been informed, the day before, by the defendant's attorney, that the deposition had never been returned and filed, or delivered to the clerk, and that the same had been for several months in the possession of defendant's attorney; that, upon inquiry of the commissioner, he was informed that the deposition was not in his custody, but that he had delivered it to defendant's attorney several months before; that, when the cause was called up for trial, the deposition had not then be filed. A further affidavit was read to the effect that, about three months after the deposition was taken, the witness had written to the defendant's attorney, stating that he was mistaken in his testimony, and desiring it retaken; and that the witness had since died.

The 30th section of the Judiciary Act, relating to testimony taken *de bene esse*, provides that "the depositions so taken shall be retained by such magistrate until he deliver the same with his own hand into the Court for which they are taken, or shall, together with a certificate of the reasons as aforesaid of their being taken, and of the notice, if any, given to the adverse party, be by him, the said magistrate, sealed up and directed to such Court, and remain under his seal until opened in Court."

Messrs. *Wells, Cook, and Lothrop*, for the plaintiff.

Messrs. *Campbell and Hand*, for defendant.

It was held by the Court :

McLEAN, J. (1) That, notwithstanding the stipulation, the deposition should have been returned in all respects, as provided by the Act.

day of trial), I received the within deposition from the hands of C. C. Jackson, Esq., the commissioner who took the same; that the same was handed to me in open Court by said Jackson in person, and the same was without envelope.

JNO. WINDER, *Clerk*.

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(2) That the deposition, having been retained in the hands of defendant's attorney for a long time, and being placed on file on the morning of the trial for the first time, could not be read in evidence.

THE SAILOR'S BRIDE.

DECEMBER, 1859.

SALVAGE.—QUANTUM MERUIT.—JURISDICTION OF CLAIMS AGAINST
FOREIGNERS.

Salvage being the compensation allowed to persons by whose assistance a ship or cargo is saved from impending peril, if the property is not benefited by the exertions of the salvors, they can claim no compensation as salvage. But if an effort be made in good faith, with means believed to be adequate, the salvor may recover something in the nature of a *quantum meruit*, though his efforts are unsuccessful.

Though a Court of Admiralty is not bound to take jurisdiction of controversies growing out of contracts between foreigners having a domicile in this country, it may lawfully exercise it, and ought to do so, where justice requires it. It has jurisdiction in a case of salvage rendered by an American tug to a British vessel in Canadian waters.

THIS was a case of salvage in which the libellant alleged that Evans, being the owner of the steamtug *Fields*, a vessel duly enrolled and licensed at Detroit, and used in navigating the lakes and rivers connected therewith, in descending the St. Clair rapids, discovered the schooner *Sailor's Bride* aground near the Canadian shore, and being informed that she was desirous of being hauled off, after some delay, procured a hawser strong enough, as was supposed, to draw the vessel from the place where she was aground, but the cable, not being of sufficient strength, parted; another, being procured, was obliged to be cut to preserve the tug from damage.

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In making this fruitless attempt, the tug was engaged six hours, and the libellant alleged that the usual charge for such service was at the rate of ten dollars an hour.

In the answer it was averred that a special contract was made with the master of the tug that unless the schooner was drawn off, no compensation was to be charged.

Mr. *W. A. Moore*, for libellant.

Mr. *Alfred Russell*, for claimant.

McLEAN, J. The schooner *Sailor's Bride* was a Canadian vessel, and was aground in the St. Clair rapids, near the Canadian shore. The tug, as appears, had been regularly enrolled and licensed at Detroit, the home port of the vessel, and was used in navigating the waters of Michigan and the adjoining States. But it seems, also, to have been used in towing boats over the St. Clair rapids, or into Detroit and other ports. On the present occasion it was performing the duties of a tug in attempting to relieve the *Sailor's Bride*.

This was a temporary duty, involving no right of navigation between two or more States, and therefore, was not within the rule of navigation as prescribed in the cases cited. (*Allen v. Newberry*, 21 How. 244; *McGuire v. Card*, *Ibid.* 248; *Jackson v. Magnolia*, 20 How. 296.)

A tug engaged in towing vessels into port is, for the time being, connected with the vessel towed, and partakes of its character. The same may be said of a towage over the St. Clair rapids or any place of difficulty. And the only question which arises is, whether an American vessel so employed may do an office of kindness to a vessel of a foreign country, as alleged to have been done or attempted to be done in this case.

To hold that this may not be done would be a strange perversion of those laws of commercial intercourse which characterize the civilized nations of the world.

A salvage service is defined to be the compensation allowed to other persons by whose assistance a ship or its loading may

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be saved from impending peril. This service must be within the Admiralty jurisdiction, and may be rendered spontaneously or by request. And it is admitted that salvage is a compensation for actual services rendered. But as, in this case, the vessel remained aground, and the owner was in no respect benefited by the efforts of the master of the tug, no compensation can be claimed on that ground.

Considering the extent of our commercial intercourse with other nations, and the numbers of foreign vessels which annually visit our ports, it becomes important to inquire to what extent foreigners, transiently here, are entitled to seek redress on the instance side of the American Admiralty.

Mr. Justice Story was of opinion that, with reference to what may be deemed the public law of Europe, a proceeding *in rem* might well be sustained by our Courts where the property of a foreigner was within our jurisdiction. Nor was he able to perceive how the exercise of such a judicial authority clashes with any principles of public policy. On the contrary, he thought the refusal might well be deemed a disregard of national comity, inasmuch as it would be withholding from a party the only effectual means of obtaining relief.

The jurisdiction of the Admiralty in matters of contract depends not on the character of the parties, but on that of the contract, whether maritime or not; when, therefore, its jurisdiction once attaches to the subject-matter, it will exercise it conformably with the law of nations, or with the *lex loci contractus*, as the case may require.

The result, therefore, of the American authorities seems to be that, though the Admiralty Courts of this country are not bound to take jurisdiction of controversies growing out of maritime contracts between foreigners having a domicile in this country, as they are between parties citizens or residents here, yet that they may lawfully exercise it, and ought to do so, in obedience to the demands of justice.

Two depositions on the part of the claimant have been taken, those of Peter Duas and Jas. Bogue, and it is objected that they were taken without notice. This is unfortunate for

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the claimant, as both of these witnesses say that compensation was not to be made to the master of the tug if the Sailor's Bride should not be drawn off. But as no notice was given of taking the depositions, they are necessarily excluded from the jury. The other deposition, that of Henry P. Odell, states that the claimant requested the master of the tug to pull off his vessel, which he attempted to do, but failed. But no facts were stated by this witness showing any special contract made by the parties, and, although in the answer it is alleged no compensation was to be paid if the Sailor's Bride should not be removed, the depositions proving the fact have been suppressed.

The case stands upon the statement of one witness as to the contract to haul off the vessel. If this be placed upon the footing of salvage, as the effort to remove the vessel was ineffectual, and no benefit resulted to the claimant, no compensation can be paid on that ground.

As the evidence does not show any agreement to pay a specific sum to relieve the vessel in jeopardy, and as a claim for salvage cannot be maintained, it can only rest on a *quantum meruit*. And at this point we have to meet the objection that although the effort was made it was fruitless, no benefit being done to the claimant. Under such circumstances, can the libellant recover? No stipulation was entered into that no compensation should be paid unless the vessel should be pulled off. The effort was made in good faith, and with means that were believed to be adequate. Six hours were laboriously employed to remove the vessel, and no want of skill was charged against the master of the tug; one cable was broken, and another was cut, in trying to accomplish the object. Under the circumstances, while I am inclined to think the master of the tug is entitled to some compensation, I do not think he is entitled to the same pay as if he had been successful. He was disappointed in his own efforts, and so was the claimant. Upon the whole, I will abate one-half of the amount allowed to the libellant, and affirm the residue of the decree with costs.

Decree varied.

DISTRICT COURT.
NORTHERN DISTRICT OF OHIO.

HON. HIRAM V. WILLSON, DISTRICT JUDGE.

THE FREE TRADER.

JULY, 1857.

PRACTICE.—CUSTODIAN'S FEES.

The marshal is entitled only to his actual necessary expenses for ship-keeping which must be established by vouchers or otherwise to the satisfaction of the Court.

MOTION to retax the marshal's charges for ship-keeper's fees. The Free Trader was seized upon attachment, remained in the custody of the marshal for 53 days, and was then sold by him. By the return of the marshal it appeared he had charged \$106 custodian fees, being at the rate of \$2 per day. No vouchers were filed showing payment of the amount, and no agreement by which the marshal was obligated to pay the same.

WILLSON, J. The Act of Congress of 1853, in relation to the fees of the marshal for keeping vessels and other property, is perfectly clear. The marshal is, by this law, entitled to receive from the fund in Court the actual necessary ex-

The Acadia.

penses he has paid, or obligated himself to pay, and no more. His claim is like any other claim or lien on the fund in Court; it must be established by vouchers or otherwise to the satisfaction of the Court, and cannot be paid except by order of the same. Let the claim for ship-keeper's fees be referred to the clerk to compute the amount paid by the marshal for keeping the schooner.

Note.—See also *The Phoebe*, Ware, 306; *The Hibernia*, 1 Sprague, 78.

THE ACADIA.

JUNE, 1859.

TOWAGE.—PRACTICE.—EFFECT OF GIVING BOND.

Towage services are maritime in their character.

The giving of a stipulation to answer judgment is a waiver of an illegal service of process.

EXCEPTIONS to a libel for services rendered in towing the Acadia from Detroit to Lake Huron, in June, 1857. The libel alleged that the service was maritime, and that the libellants had also a lien by virtue of the laws of Michigan when the services were rendered. The warrant of arrest was issued and placed in the hands of the late Marshal Fitch, after his term of office had expired. The vessel, however, was arrested by him, and the owners thereupon gave the stipulation required by the rules to pay any decree that might be rendered against her, and she was thereupon released.

Exceptions were filed to the libel upon the following grounds:

(1) That the vessel had never been legally seized, and the stipulation was therefore void.

The Clarion.

(2) That the service set up in the libel was not maritime in its nature.

Messrs. *Willey & Carey*, for libellant.

Mr. *C. W. Palmer*, for claimant.

WILLSON, J. It is too late now to move the dismissal of the libel. The giving of a voluntary bond by the owner is a waiver of any defect in the service of the process. He should have moved the discharge of the vessel before giving the bond. For the purpose of hearing motions the court is always open.

The averments in the libel are sufficient, and the service is maritime.

Exceptions overruled.

THE CLARION.

MARCH, 1859.

JURISDICTION.

Admiralty has jurisdiction of a suit to recover for services of a tug in hauling off a vessel aground, though the same do not amount to a salvage service.

EXCEPTIONS to libel for services rendered by libellants' tug John Owen to the brig Clarion, aground upon St. Clair flats, in towing her off the flats and into Detroit river, in October, 1857.

Messrs. *Willey & Carey*, for libellants.

Messrs. *Basset & Kent*, for claimant.

The Sunshine.

WILLSON, J. Exceptions were filed to the libel in this case upon the ground that the services set forth were not of a maritime character, and that this Court has no jurisdiction. I am satisfied, however, they cannot be sustained. The services of a steam tug, in hauling off a sailing vessel aground, are of a very meritorious description; if the vessel were aground upon a lee shore, exposed to the open lake, they might amount to a salvage service. In any event, they could not be less meritorious than towage, and this Court has already held, in the case of the *Acadia*, that a lien exists for towage. I think the contract in this case is a maritime one, within the definition laid down in *De Lovio v. Boit*, 2 Gall. 398.

Exceptions overruled.

THE SUNSHINE.

JUNE, 1859.

PRACTICE.—TENDER.

A tender after suit brought must include costs, though the process has not been served.

AN attachment was issued against the *Sunshine* upon a libel filed by one Kimball. The marshal returned that the vessel could not be found in his district. Afterwards the owner came into Court, tendered the amount of the debt claimed in the libel, but without costs.

Messrs. *Willey & Carey*, for libellant.

- Messrs. *Ranney, Backus & Noble*, for respondent, insisted that the claimant was not bound to include costs in the tender, as there had been no arrest of the vessel.

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WILLSON, J. The tender should include not only the debt, but all costs incurred up to that time, notwithstanding the vessel has never been seized. The filing of the libel and the delivery of the writ to the officer is a commencement of suit which entitles the libellant to costs.

Decree for libellant.

REVENUE CUTTER NO. 1.

MARCH, 1860.

ASSIGNMENT.—PURCHASE BY GOVERNMENT OF VESSEL SUBJECT TO
LIENS.—JURISDICTION UPON THE LAKES.

The assignment, by the builders of a vessel, of the moneys to become due on the building contract, invests the assignee with no such proprietary interest as will enable him to appear as claimant and defend.

The purchase by the Government of a vessel for the revenue service does not divest the same of valid liens existing at the time the title was acquired. The Government takes *cum onere*, and the liens may be enforced by the ordinary methods.

Admiralty and maritime jurisdiction possessed by the District Courts of the United States on the Western lakes and rivers, under the Constitution, and Act of 1789, independent of the Act of 1845, and unrestricted thereby.

THIS was one of some thirty or more separate libels filed by these libellants and others against Revenue Cutters numbered (originally) One, Two, Three, Four, Five, Six, built by Merry & Gay, ship-builders, at Milan, Ohio, under contract with the Government, in 1858, and designed for service on the Western lakes.

The libels were for materials furnished the builders for the construction of these vessels, and were founded upon liens acquired under the Mechanics' Lien Law of Ohio.

Pleas to the jurisdiction were interposed by the United States District Attorney, Hon. *Geo. W. Belden*, in behalf of

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the Government, and by Hon. *R. P. Spalding*, on behalf of Andrews & Otis, claiming, 1st, that these vessels, by a true construction of the contract between the builders and the Government, belonged to the Government *ab initio*, and that, if so, no lien attached, as liens could not be acquired against Government property, and as in order to come within the provisions of the statute relied upon, the materials must have been furnished by virtue of a contract with the then owners of the vessel; and

2d. That the Government having taken possession of the cutters before these proceedings were instituted, the liens, if any existed, were cut off, or at all events could not be enforced by seizure of public property, and cited *The Lord Hobart*, 2 Dodson, 100; *Id.* 451; 3 Hall Am. L. R. 128; Bee's Ad. 112, 422; 1 Dall. R. 77; 3 B. & B. 275; 4 How. 20, 286.

Willey & Carey, for the libellants, reviewed the above cases, and claimed:

1st. That Andrews & Otis, having no proprietary interest in the vessels, but only in a portion of the contract price, by assignment from the builders, could have no such *persona standi in judicio* as would entitle them to be recognized as claimants.

2d. That the vessels continued to be the property of the builders until they were completed and delivered to the officers of the Government, and by them accepted—that where anything remains to be done before the sale of personal property is complete, no title passes, citing Long on Sales, 267; Chitty on Contracts, 375–8; 2 Green. Ev. 528; 6 East, 614; 15 Johns. 349; 21 Pick. 384; Story on Con. § 18; Story on Sales, § 296; 2 Kent, 496.

3d. That although the cases cited might establish the doctrine that liens could not be *acquired* against public property, yet that if such liens existed *at the time* the property was acquired by the Government, they were not thereby divested or discharged, citing 3 Sumner, 308; 9 Wheat. 409; 1 Dall. 77 (Argument of Attorney General).

WILLSON, J. This is a proceeding *in rem*, to recover the value of materials furnished by the libellants in the building of a vessel, which, at the time of its seizure in this suit, was owned by the United States, and in the use of the revenue service.

The account, as it appears itemized in the schedule, accrued at various periods between the 22d day of November, 1856, and the 15th day of June, 1857. The materials were supplied to Merry & Gay, of Milan, who were contractors with the United States (through the Secretary of the Treasury) for the building of six revenue cutters for the revenue service of the Government.

The libellants claim the right to this proceeding in the admiralty by virtue of a lien acquired by them upon the vessel under the statute law of Ohio of March 11th, 1843, and the Act amendatory thereto, passed March 12th, 1853.

The first parties who seek to be admitted upon the record to defend, as claimants, are Andrews & Otis. They were bankers at Milan, and (it is said) furnished Merry & Gay a large sum of money to aid in the construction of these vessels, taking, as security therefor, on the 1st of August, 1857, all Merry & Gay's demands and claim upon the Government by virtue of said contract of building, and also any and all interest they might then have in the vessels.

The second claimant is the Government of the United States, which, by the District Attorney, has filed its claim to the absolute ownership of the property, and has also answered, setting forth, among other things, that the vessel in question, at the time of its seizure by process in this suit, was a public armed vessel of the United States actually employed in the revenue service of the Government; and it is insisted, in the answer filed by the District Attorney, that the vessel, being so owned and employed, is exonerated and discharged from all liens of individuals which accrued during her construction, and is also exempt from seizure upon process *in rem* in the admiralty to enforce the lien thus acquired.

The first point we are called upon to consider is, whether

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Andrews & Otis have the kind of interest in the suit requisite to establish a "*persona standi in judicio*."

It is not sufficient to entitle a party to intervene and defend, when it is simply shown that he has an interest in the question litigated. He must have rights in the vessel itself, that is, an ownership either general or special in the property, or such a claim as operates directly upon it by way of a lien, statutory or maritime. Hence, it is necessary to inquire into the sort of interest, if any, acquired by Andrews & Otis in the revenue cutter seized in this suit. And for this purpose we must examine some of the terms of the contract entered into by and between the United States and Merry & Gay for the construction of these vessels, and the subsequent assignments of the latter to the United States and to Andrews & Otis, with reference to the respective dates and the purposes of those assignments.

The contract for building the vessels bears date November 17th, 1856. By its terms Merry & Gay were to construct, equip and deliver afloat to the United States six cutters of 50 tons burden each. They were to furnish the labor and materials for the building and equipment at their own expense; and it was further stipulated, that on each of said cutters being so far advanced as to be planked, ceiled and decks laid, the Government should pay \$2,025 to Merry & Gay, they executing an assignment of said vessels as a further security for said advances, and upon completion and delivery agreeably to the terms of the contract, a final payment of \$2,025 for each, was to be made in full satisfaction.

On the 25th day of April, 1857, Merry & Gay received from the United States \$2,025, the first instalment provided for in said agreement, and thereupon executed and delivered to the Government agent, for the benefit of the United States, a full and unconditional assignment and transfer of their interest in said Cutter No. 1, which assignment was duly filed by said agent in the clerk's office of the township of Milan, but nevertheless was so received and filed as a mortgage security for the advance made.

On the 8th of September, 1857, the said six revenue cutters

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having been fully finished and equipped by Merry & Gay (and who up to that time had retained exclusive possession and control of them), were delivered by the contractors to the Government agent, and accepted by him in full satisfaction of the fulfilment of the contract to the Government on the part of Merry & Gay.

By an instrument of writing, bearing date August 1st, 1857, Merry & Gay assigned and set over to Andrews & Otis all their interest in said cutters, and all claim to the second instalment due them from the United States, under the contract of 17th November, 1856, being the sum of \$12,150; and on the 4th of September, 1857, a like assignment was made of a further claim against the United States of \$14,000, being the amount allowed by the Government to Merry & Gay for extra work and materials.

Upon this statement—the whole transaction in relation to the construction, title and incumbrances upon said Cutter No. 1—it is as difficult for us to perceive any lien acquired by Andrews & Otis upon the vessel as it is to find in them any right of property to it.

By the assignment of August 1st, 1857, Andrews & Otis obtained no other lien than that possessed by Merry & Gay. It is not pretended that the latter ever acquired any lien by virtue of the local laws. Nor in my opinion, was any conferred by the general maritime law. The vessel was built at Milan, in the State of Ohio, which place, to all intents and purposes, was her home port. The United States could not, in any sense, be deemed a foreign contractor. And under the decision of the Supreme Court of the United States, in the case of the *People's Ferry Co. v. Beers et al.*, 20 How. 393, pronounced at the December term, 1857, a contract for building a domestic ship, cannot be regarded as a maritime contract. The Court, in that case, say “the contract is simply for building the hull of a ship and delivering it on the water. She was constructed and delivered according to contract. The Admiralty jurisdiction is limited to contracts, claims and services purely maritime, and touching rights and duties appertaining

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to commerce and navigation." And the Court adopt the language of Judge Hopkinson, used in 1781, and declare, as respects ship-builders, that "the practice of former times doth not justify the admiralty's taking cognizance of their suits."

In that case the Court advanced still further in restricting maritime liens upon what was declared to be without the jurisdiction of the admiralty in *Pratt v. Reed*, 19 How. 359. The case decided by the Supreme Court at the late December term, was simply one where a vessel owned in New Jersey was built in that State by the libellants, on credit, and without any express pledge of the vessel for the debt, and where no lien was provided or secured by the local law. And the Court say in the opinion delivered, that "the question presented involves a contest between the State and Federal governments. The latter has no power or jurisdiction beyond what the Constitution confers. The contest here (say the Court) is not so much between rival tribunals as between distinct sovereignties claiming to exercise power over contracts, property and personal franchises. What were meant in 1789 by 'cases of admiralty and maritime jurisdiction,' must be meant now. What was reserved to the States to be regulated by their own institutions, cannot be rightfully infringed by the General Government, either through its legislative or judiciary department."

It is our purpose to dispose of questions of admiralty law in subordination to the judgments and decisions of the Supreme Court of the United States, how much soever those decisions may vary from the rules of law previously established by maritime Courts upon the same subject. Under its decisions, and the principles of law enunciated by that Court, the contract between Merry & Gay and the United States was not a maritime contract. Nor did the money advanced by Andrews & Otis, for the building of these revenue cutters, impose a maritime lien which attached to the vessels.

It is clear, then, that Merry & Gay, having no lien by virtue of the contract for building, none was transferred by their assignment to Andrews & Otis.

It is equally clear that the assignment to Andrews & Otis

did not, nor was it intended to pass the legal title to the property. The purpose of the assignment was to transfer to the assignees the unpaid claim upon the Government. It was the palpable intention to give the assignees all the rights to the claim and the facilities for its collection that the assignors possessed. Merry & Gay retained the property, finished the construction of the vessels and exercised exclusive ownership over them, until they were delivered over to the Government agent on the 8th of September, 1857.

So far, then, as Andrews & Otis are concerned, they have neither a *jus ad rem* nor a *jus in re*, and consequently cannot be admitted upon the record as claimants to defend in this suit.

We proceed to the other branch of the case, and inquire, whether a vessel owned by the United States, and actually employed in the revenue service, is exonerated and discharged from all liens of individuals which accrued before the Government obtained title, and whether it is consequently exempt from seizure upon process *in rem* in the admiralty to enforce such lien.

It is not deemed necessary to discuss the point as to the time when the United States acquired title to this revenue cutter.

We are satisfied, from an examination of the contract between the Government and Merry & Gay, that the title was in the latter until the vessel was completed and delivered to the Government agent in September, 1857, and received and accepted by him in fulfilment of the terms of the contract.

Nor is it necessary to inquire into the character and effect of the assignment to the Government of Merry & Gay's interest in the vessel, which was made on the 25th day of April, 1857. Nor do we understand it to be seriously controverted by counsel, that the libellants acquired a valid lien under the State law, while the vessel was owned and in the possession and control of the builders.

We have, then, the naked proposition presented of the extinction of a valid lien upon a vessel by the acquisition of title to it by the Government and its use in the revenue service.

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This is not a case of contract for supplies to the United States. The position taken by counsel in the argument, and the authorities cited by them, in support of it, that in contracts for supplies or repairs for Government ships, no lien can be presumed to exist, does not reach the real question, the solution of which is decisive of this controversy. In that class of cases, Mr. Justice Story well remarked in *United States v. Wilder* (3 Sumner, 308), "that there may be a just foundation for a distinction as to liens between the case of the Government and that of a mere private person in many cases of contract. It may, perhaps, be justly inferred in many cases, from the nature of certain contracts, and employments and services of the Government, that no lien attaches thereto. For example, it may be true that no lien exists for repairs of a public ship, or for materials furnished therefor, or for wages due to the crew thereof; or for work and labor performed upon the arms, artillery, camp equipage and other warlike equipments of the Government. In such cases the nature and use of the articles, as the means of military and naval operations may repel any notion of any lien whatever grounded upon the obvious intention of the parties." And the reason is, that when the contract is made with the Government, the presumption of the law should be, that the credit was given solely to the Government without any reliance, as a security, upon such implements of military and naval warfare. The argument *ab inconvenienti* has no force, except in that class of cases where the contract is made directly with the Government, and where, from public policy, the materials are deemed to be supplied and the labor performed upon the credit of the nation, the reliance for payment resting solely upon its justice and good faith.

But in relation to the rights of the Government and the immunities of property purchased by it, whether real or personal, a very different rule of law obtains founded upon equally sound reasons. If property is obtained by purchase, the Government acquires no better title than that possessed by its vendor. If the property is legally incumbered by mortgage

or other liens, the transfer of title does not divest it of those incumbrances. In this respect the Government stands upon the same footing as that of individuals. In controversies in Courts of justice, involving the rights of property, it has no muniments of title sanctified by sovereignty which should exempt it from the rules of law governing individuals in like cases. No well considered case can be found any where, which declares that bare possession of property by the Government when wrongfully obtained, of necessity changes the title and vests it in the sovereignty, or if justly obtained, that such possession extinguishes the lawful liens of individuals upon it. Such a doctrine would be monstrous, and an anomaly in a nation whose government is one of just laws, and whose Constitution declares that "private property shall not be taken for public use without just compensation."

In the case at bar, there is no privity of contract between the libellants and the Government of the United States. The transaction was with, and the credit given to, Merry & Gay, and security for the debt obtained by a lien upon the vessel under and by virtue of the law of the sovereign State of Ohio. The sovereignty which, by just and constitutional law, imposes and secures the lien, will recognize, and if need be, may by law enforce the remedy. This remedy, however, may be obtained by proceedings in a Court of admiralty under the 12th Rule prescribed by the Supreme Court of the United States, which rule provides "that in all suits by material-men for supplies or repairs or other necessities for a foreign ship, or for a ship in a foreign port the libellant may proceed against the ship and freight *in rem*, or against the master or owner alone *in personam*. And the like proceedings *in rem* shall apply in cases of domestic ships, where by the local law a lien is given to material-men for supplies, repairs or other necessities."

Entertaining these views, the exceptions of the libellants to the claim and answer of Andrews & Otis are sustained, and the exceptions of the United States to the libel are overruled.

This cause again came on to be heard on a further objection to the jurisdiction, and on the merits.

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Messrs. *Belden* and *Spalding*, for the respondent, on the evidence, claiming :

1st. That credit was given to the builders, and not in any manner to the vessels.

2d. That the liens, if any attached, had been waived by the subsequent transactions of the parties.

And it was further claimed by Judge Belden that these vessels, not being "enrolled and licensed for the coasting trade," or "employed in business of commerce and navigation," &c., were not within the purview of the Act of Congress of February 26, 1845, and were therefore not the subjects of admiralty jurisdiction.

Messrs. *Willey* and *Cary*, for the libellants, insisted :

1st. That it is no objection that credit is given to several vessels collectively, and not to each separately, provided what actually entered into the construction of each can be afterwards ascertained (7 Watts and Serg. 381; 13 Pa. St. 167; 17 *Id.* 234; *The Kiersage*, 2 Curtis, 421; 2 Ohio St. R. 114).

2d. That under the mechanics' lien law, no proof of credit being given to the structure is required (18 Ohio R. 202).

3d. Negotiable paper received, no payment or waiver of lien (3 McL. 265; 4 *Id.* 128; *The Fashion*, Newb. 52; 6 McL. 472; *The Barque Chusen*, 2 Story, 455; *The Schooner Active*, Olcott, 286; Flanders Ship'g, 341, 374; Ware, 185; Davies, 112). Giving credit no waiver (1 Sumn. 73; Davies, 112). Must be *clear evidence* that lien waived (Newb. R. 55; 2 Story, 468; Davies, 112). Always the *presumption* that new securities are taken merely as auxiliary (Davies, 114, 119).

4th. That sec. 2 of article 3 of the Constitution, confers admiralty jurisdiction upon the Federal Courts.

Sec. 9 of the Judiciary Act of 1789, assigns this jurisdiction to the District Courts.

The jurisdiction thus granted is without limitation, so far

as ordinary seizures are concerned, for it will be found, on inspection, that the language which *follows* this grant of jurisdiction, and which refers to seizures made on waters navigable from the sea, &c., is *limited* to "seizures under laws of impost, navigation or trade" (*The Steamboat Magnolia*, 20 Howard, 309, Mr. Justice Daniel).

Hence, as no such limitations as are contained in the Act of 1845 existed at the time the Constitution was adopted, it follows that, under the Constitution, as construed in 12 How. 443, and the Act of 1789, general original admiralty and maritime jurisdiction was *possessed* by the District Courts upon the lakes and rivers as well as upon the seaboard, *before this Act of 1845 was passed*, and this without *any* limitation except as to "seizures under laws of imposts," &c.

The whole question, then, is narrowed down to this: Is the Act of 1845 to be treated as a *restraining* statute, or as merely *cumulative* to the Act of 1789?—in other words, Is an Act passed for the purpose, as avowed in its title, of "*extending* the jurisdiction of the District Courts," to be so construed as to limit and *abridge* the jurisdiction they already possessed?

A later Act cannot repeal or modify a prior one, except by express terms or necessary implication, and this implication must be founded upon a clear repugnancy of the later with the former statute (see authorities on the interpretation of statutes, collated in Curwen's Revised Laws of Ohio, 13, 17; 15 Ohio R. 65; 15 Johns. R. 220; 16 Peters, 362; 3 How. 646). Hence, the Act of 1845 is to be treated merely as cumulative, and in fact superfluous, not as restrictive or abridging; and if so, the objection that these vessels were not enrolled and licensed, or engaged in commerce or navigation, is of no avail, because no such limitations exist in the statute of 1789, which, as we have seen, stands unaffected by the Act of 1845.

WILLSON, J. The most important matter for consideration in this case is involved in the question of the jurisdiction of the Court over the vessel seized, as the record shows such vessel was not enrolled and licensed for the coasting trade, or

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engaged in the business of commerce and navigation between different States.

This inquiry, more properly, should have been disposed of at the inception of proceedings in the cause, but its great practical importance has induced us to reserve the point for decision till the final hearing.

The question of jurisdiction arises upon the construction of the 9th section of the Judiciary Act of 1789 (vol. 1, stat. 76), and the legal effect to be given to the Act of February 26th, 1845 (vol. 5, stat. 726).

It is claimed by the counsel for the respondent that this vessel, not being enrolled and licensed for the coasting trade, or employed in business of commerce or navigation, &c., was not within the purview of the Act of 1845, and, consequently, was not subject to admiralty process *in rem* in the District Court of the United States.

The consideration of this branch of the case demands a careful examination of the Constitution of the United States and the Acts of Congress by which admiralty jurisdiction is conferred upon the Federal Courts.

Section 2, in article 3 of the Constitution, declares that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction.

The 9th section of the Judiciary Act of 1789 provides that "the District Courts shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation, or trade of the United States, where the *seizures* are made on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas."

In the case of *Jackson et al. v. Steamboat Magnolia* (20 How. R. 298), Mr. Justice Grier, in delivering the opinion of the Court, says that "before the adoption of the present Constitution, each State, in the exercise of its sovereign power, had its own Court of Admiralty, having jurisdiction over the har-

bors, creeks, inlets, and public navigable waters connected with the sea.

“This jurisdiction was exercised not only over rivers, creeks and inlets which were boundaries to or passed through other States, but also when they were wholly within the State. Such a distinction was unknown. Nor had these Courts been driven from the exercise of jurisdiction over torts committed on navigable water within the body of a county, by the jealousy of the common law Courts.

“When, therefore, the exercise of admiralty and maritime jurisdiction over its public rivers, ports and havens was surrendered by each State to the Government of the United States, *without an exception as to subjects or places*, this Court cannot interpolate into the Constitution, or introduce an arbitrary distinction which has no foundation in reason or precedent.”

It had been previously held by the same high authority (12 How. R. 454), that “there is nothing in the ebb and flow of the tide that makes the water peculiarly suitable for admiralty jurisdiction, nor anything in the absence of a tide that renders it unfit. If it is public navigable water, on which commerce is carried on between different States or nations, the reason for the jurisdiction is precisely the same. And if a distinction is made on that account, it is merely arbitrary, without any foundation in reason.”

The Chief Justice, in the case of the *Genesee Chief*, with a just and comprehensive view of the rights and necessities of the people in the States bordering upon the lakes, declares that “Courts of Admiralty have been found necessary in all commercial countries, not only for the safety and convenience of commerce and a speedy decision of controversies where delay would often be ruin, but also to administer the laws of nations in a season of war, and to determine the validity of captures, and questions of prize or no prize in a judicial proceeding. And it would be contrary to the first principles on which the Union was formed, to confine these rights to the States bordering on the Atlantic and to tide-water rivers connected with it, and deny them to the citizens who border on the lakes and the

great navigable streams which flow through the Western States. Certainly such was not the intention of the framers of the Constitution; and if such be the construction finally given to it, by this Court, it must necessarily produce great public inconvenience, and at the same time fail to accomplish one of the great objects of the framers of the Constitution—that is, perfect equality in the rights and privileges of the citizens of the different States, not only in the laws of the General Government, but in the mode of administering them.”

This exposition, by the Supreme Court, of the power given in the Constitution to the General Government over all cases of admiralty and maritime jurisdiction, *is conclusive* that Congress has authority to confer this jurisdiction upon the Federal Courts, to the full extent of power possessed by the judges of the Vice Admiralty Courts in this country under the colonial system, and the State Admiralty Courts under the confederation; and that this jurisdiction is not affected by the restraining statutes of Richard II and Henry IV of England.

The next inquiry is, whether Congress, in framing the 9th section of the Judiciary Act, failed to carry out this great purpose of equality in the laws of the United States, and the mode of administering them in all the States of the Union, without any exception as to the subjects and places.

The first clause of the section quoted provides that “the District Courts shall have exclusive original cognizance of all civil cases of admiralty and maritime jurisdiction.”

This provision is complete in itself, and invests the District Courts with absolute admiralty and maritime jurisdiction, without any restriction as to the powers conferred, or any limitation as to the subjects and places for the exercise of those powers. And unless the succeeding clause in this 9th section was intended to restrict the former, then there can be no doubt of the authority of the District Courts to exercise, by virtue of the statute, admiralty jurisdiction over vessels upon the waters of the great lakes.

We again quote the language of the succeeding clause, to wit: “including all *seizures* under laws of impost, navigation

or trade of the United States, when the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas."

The statute, by words of well defined meaning, in the first clause confers upon the District Courts admiralty and maritime jurisdiction. In the second clause it confers upon the District Courts jurisdiction of a class of common law cases, over which Courts of Admiralty had never before taken cognizance.

In England, seizures under the laws of imposts were peculiarly cognizable in the Court of Exchequer under the authority and process of the common law. Cases of forfeiture for breaches of the revenue laws were cognizable in the Exchequer upon information, though seizure was made upon navigable waters; and the question of *fact*, on which the forfeiture arose, was always tried by a jury. And such also was the course of procedure in the Exchequer for the violation of the navigation laws. In the case of the *Attorney General v. Jackson* (Bunb. R. 236), the seizure was of a vessel for the breach of the "act of navigation," and the proceeding was by information and trial by jury, according to the course of the common law.

Congress, in the exercise of its authority, under the Constitution, to establish the Federal Courts, did not see fit to create a Court of Exchequer. It established the Supreme, Circuit, and District Courts, and defined their powers. It was competent to give to either of them the administration of the laws relating to imposts, navigation and trade. It was given to the District Courts, to be exercised within their respective districts, when *seizures* should be made on waters which are navigable from the sea by vessels of ten or more tons burden.

This authority and its limitation had reference to the exigencies of the foreign trade of the country, and to the enforcement of revenue laws relating to imposts.

It was doubtless supposed that vessels employed in the foreign trade and navigating the ocean would exceed ten tons burden, and that in carrying on the commercial operations of the

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country, such vessels would enter the rivers, inlets and bays whose waters are navigable from the sea.

The giving to the District Courts cognizance over this class of common law cases was not essential, nor was it intended to give strength to the admiralty powers previously conferred. The jurisdiction of the Court over one class of cases has no necessary connection with the jurisdiction over the other. And hence, by no rule of construction, can the limitation of the jurisdiction of the Court over seizures, under laws of imposts, made upon waters navigable from the sea, be held to limit the jurisdiction of the Court in the exercise of its powers in admiralty and maritime cases. A contrary rule of construction would make the statute an instrument of injustice, and defeat the great purpose of the Constitution, as interpreted by the Supreme Court of the United States.

We hold, then, that by virtue of the 9th section of the Judiciary Act of 1789, the District Courts of the United States have precisely the same admiralty jurisdiction upon the great lakes as upon the navigable waters of the seaboard; and that the maritime law has the same application to cases upon these inland seas, as it has to those on tide waters.

We now proceed to examine and consider the operation and legal effect of the Act of February 26, 1845.

This law provides that "the District Courts of the United States shall have, possess, and exercise the same jurisdiction in matters of contract and tort, arising in, upon, or concerning steamboats and other vessels of twenty tons burden and upwards, enrolled and licensed for the coasting trade, and at the time employed in business, of commerce and navigation between ports and places in different States and territories upon the lakes and navigable waters connecting said lakes, as is now possessed and exercised by the said Courts in cases of the like steamboats and other vessels employed in navigation and commerce upon the high seas, or tide waters, within the admiralty and maritime jurisdiction of the United States; and in all suits brought in such Courts in all such matters of contract or tort, *the remedies* and the forms of process, and the modes of

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proceeding shall be the same as are or may be used by such Courts in cases of admiralty and maritime jurisdiction; and the maritime law of the United States, so far as the same is or may be applicable thereto, shall constitute the rule of decision in such suits, in the same manner, and to the same extent, and with the same equities as it now does in cases of admiralty and maritime jurisdiction; saving, however, to parties, the right of trial by jury of all facts put in issue in such suits, where either party shall require it; and saving also to the parties the right of a concurrent remedy at the common law, when it is competent to give it, and any concurrent remedy which may be given by the State laws, where such steamer or other vessel is employed in such business of commerce and navigation."

The circumstances, and the apparent necessity which induced Congress to enact this law, are well understood by the profession in the States bordering upon the great lakes. Previous to the year 1845, the Supreme Court of the United States had, by a uniform course of decision, adopted the theory of the English Courts, of limiting the jurisdiction of the admiralty to waters subject to the ebb and flow of the tide. In the case of the steamboat *Thomas Jefferson* (10 Wheat. R. 428), decided in 1825, it was held that the admiralty had no jurisdiction over contracts for the hire of seamen, except in cases where the service was performed upon the sea, or upon waters within the ebb and flow of the tide. This was a leading case, and the opinion of the Court was pronounced by Mr. Justice Story, who was pre-eminent for his learning, and whose expositions of constitutional and maritime law have ever commanded respect at home and abroad. But this learned jurist evidently saw and felt the injustice of the rule of law established in that case; for he there put the *quære* whether, under the power to regulate commerce, Congress might not extend the remedy, by the summary process of the admiralty, to the case of voyages on the Western waters. And, in the opinion delivered, he gave the significant suggestion (since acted on by Congress) that "if the public inconvenience from the want of process of an analogous nature

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shall be extensively felt, the attention of the Legislature will doubtless be drawn to the subject."

The same doctrine of limiting the admiralty jurisdiction to tide water, was again affirmed in 1837, by the same Court, in case of *The Steamboat Orleans v. Phaebus* (11 Peters R. 175).

This continued and apparently settled interpretation of the Constitution by the highest judicial tribunal of the country, and its palpable injustice to those connected with the great commercial marine of the lakes, left to Congress no other alternative than to profit by the suggestion of the Court, intimated in the case of the *Thomas Jefferson*, and if possible by legislation, to mitigate the evil and soften the injustice resulting from the doctrine of those cases.

It was this condition of things that brought about the passage of the Act of February 26, 1845.

The law is entitled "An Act to extend the jurisdiction of the District Courts to certain cases upon the lakes and navigable water connecting the same." The Act, neither in its title or its body, purports to confer upon the District Courts admiralty and maritime jurisdiction; nor was such the purpose of its framers. It authorizes *quasi* admiralty proceedings in certain cases, it is true. But it is clear that Congress did not look to the 2d section of the 3d article of the Constitution for its authority to pass the Act, for, at that time, it was well settled by the judgment of the Supreme Court, that this second section did not invest the Government of the United States with any power to confer upon the Federal Courts admiralty jurisdiction over waters not affected by the tide.

It is equally clear that in passing the Act, Congress looked for its authority *solely* to the 8th section of the 1st article of the Constitution, which declares that "Congress shall have power to regulate commerce with foreign nations and among the several States."

Under this provision it had been repeatedly held that Congress has power to legislate over navigation as well as trade; that it has power to prescribe what shall constitute American

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vessels and the national character of the seamen who shall navigate them; and also to prescribe rules and regulations for the intercourse and navigation of such vessels between the different States and territories.

But the Act of 1845 does not repeal or otherwise abrogate the 9th section of the law of 1789, or any part of it. At most, it can only be regarded as affording *remedies* which are cumulative upon former laws. It designates a class of vessels of twenty tons burden and upwards that are enrolled and licensed for the coasting trade, and at the time employed in business of commerce and navigation between ports and places in different States and territories upon the lakes. It makes no provision in relation to vessels engaged in the foreign trade; nor does it embrace remedies upon a large variety of maritime contracts, having no connection with the navigation and trade between different States.

We know of no rule of construction by which the Act of 1845 should be held to have the effect of repealing any portion of the 9th section of the Judiciary Act, or to abridge any of the admiralty powers conferred upon the District Courts by the statute of 1789. Its purpose, as avowed in its title, is "to *extend* the jurisdiction of the District Courts;" and it certainly cannot be so construed as to limit and abridge an existing jurisdiction.

This interpretation and construction of the Act of 1845, as to its effect upon previous legislation, is amply sustained by authority.

When a statute gives a new remedy without impairing or denying one already known to the law, the rule is to consider it as cumulative, allowing either the new or the old remedy to be pursued (15 Ohio R. 65; 15 Johns. R. 222).

To repeal a statute by implication, it is not sufficient to establish that subsequent laws cover some or even all the cases provided for by the prior law, for they may be merely affirmative, or cumulative, or auxiliary. But there must be a *positive repugnancy*; and even then the old law is repealed only *pro*

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tanto to the extent of the repugnancy (16 Peters R. 362; 3 How. R. 646).

There is no repugnancy between the Acts of 1789 and 1845. Under the former law, the District Courts have jurisdiction of vessels under twenty tons burden, whether enrolled and licensed or not, and also of vessels employed in the foreign trade.

And they have jurisdiction of those exceeding twenty tons burden that are enrolled and licensed, and engaged in navigation between different States, not only by virtue and under the authority of the Act of 1789, but also by the Act of 1845; and yet the right of the trial of facts put in issue to a jury, is secured in all cases.

This we believe to be the true import and legal effect of the two Acts of Congress, when considered and construed together.

We do not intend or desire to enter upon a discussion of the constitutional power of Congress to pass, and to make either of these laws operative upon the great lakes. Nor is it for us to sit in judgment upon the merits of the controversy which, for many years, has engaged the members of the Supreme Court of the United States, upon the question of limiting the admiralty jurisdiction of the Federal Courts to tide waters. That controversy has been distinguished for great ability and profound learning. It has been attended with all the sensitiveness (and yet without any of the arrogance or acrimony), which characterized the struggle for jurisdiction in England, between the Courts of common law and those of the admiralty and chancery, in the early part of the seventeenth century. We are well satisfied with the interpretation of the Constitution, as to the extent of the admiralty powers possessed by the general Government, which is now established by the mature judgment of the Supreme Court of the United States; and it is enough to know that the cases of the *Steamboat Thomas Jefferson* (12 Wheat.), and the *Orleans v. Phœbus* (11 Peters), are overruled cases, and that the doctrine maintained by the Supreme Court in the cases of the *Genesee*

The Isabella.

Chief and steamboat Magnolia, furnishes a rule of decision which is of paramount authority in all the Courts of the United States.

On the whole, we are of the opinion that the admiralty jurisdiction of this Court is rightfully exercised over the vessel seized in this case, and that it is no valid objection to the jurisdiction, that the vessel, at the time of seizure, was not enrolled and licensed for the coasting trade, or engaged in the business of commerce and navigation between different States or territories.

Decree for libellant.

THE ISABELLA.

MARCH, 1860.

JURISDICTION.—WATER-CRAFT LAWS.

The District Courts of the United States having, under the Constitution and Acts of Congress, exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, the Courts of common law are precluded from proceeding *in rem* to enforce such maritime claims.

THIS was a proceeding *in rem* to recover seaman's wages, alleged to have been earned on the brig Isabella, between the 29th day of September and the 7th day of December, 1858.

The libel was filed on the 8th of September, and a monition issued on the 6th day of October, 1859.

Seth W. Johnson and Erastus Tisdale appeared and interposed their claim as sole owners of the brig. They filed their answer, setting forth (among other things) that they became owners of the brig on the 3d day of October, 1859, by virtue of a purchase made at sheriff's sale, ordered by the Court of Common Pleas of Cuyahoga county, in suits instituted by Val-

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entine Swain and others against the said vessel, under the water-craft law of the State of Ohio.

They further alleged that the libellant had full knowledge of the sale, and the other proceedings in the State Court, under and by virtue of which it was made. They also alleged that the libellant, on the 8th day of July, 1859, commenced a suit against said brig, in the State Court, under the State water-craft law, upon the identical account described in this libel, and that such proceedings were had that upon the 9th day of July, 1859, he recovered judgment against the vessel for the amount of his claim. That the proceeds of the sale of the vessel now remain in the Court of Common Pleas, subject to its order of distribution, according to the priority of liens acquired under the laws of the State of Ohio. And that, inasmuch as the libellant's judgment in the State Court will be marshaled among the other liens for the purpose of distributing the fund, he is not entitled to prosecute his suit in admiralty against the brig.

To this answer the libellant excepted, on the ground that the facts set forth in the answer are not sufficient to constitute a defense to his claim, or to prevent the prosecution and satisfaction of it in the admiralty.

Messrs. *Willey & Carey* and *J. C. Vail*, for libellant.

Messrs. *Ranney, Backus & Noble*, for claimants.

WILLSON, J. "There are some principles of law (said Chief Justice Taney, in the case of the *Royal Saxon*) which have been so long and so well established, that it is sufficient to state them without referring to authorities.

"The lien of seamen for their wages is prior and paramount to all other claims on the vessel, and must be first paid.

"By the Constitution and laws of the United States, the only Court that has jurisdiction over this lien, or authorized to enforce it, is the Court of Admiralty, and it is the duty of that Court to do so.

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“The seamen, as a matter of right, are entitled to the process of the Court to enforce payment promptly, in order that they may not be left penniless, and without the means of subsistence on shore. And the right to this remedy is as well and as firmly established as the right of the paramount lien.

“No Court of common law can enforce or displace this lien. It has no jurisdiction over, nor any right to obstruct or interfere with the lien, or the remedy which is given, by the Constitution and Acts of Congress, to the Courts of Admiralty to enforce it.”

As early as 1792, the District Court of Pennsylvania, in the case of *Jennings v. Carson* (Peter's Adm. R. 1), decided that Congress, by the Act of 1789, meant to convey to the District Courts all the powers appertaining to admiralty and maritime jurisdiction, including that of prize. And whatever doubts then existed as to the real import of the Act of 1789, were seemingly dissipated in 1794, by the decision of the Supreme Court in the case of *Glass v. The Sloop Betsey* (3 Dallas, 6), which declared that the District Courts possessed all the powers of Courts of Admiralty, including, as we suppose, all the remedies incident to that jurisdiction.

Chancellor Kent, in his commentaries, says that “whatever admiralty and maritime jurisdiction the District Courts possess, would seem to be *exclusive*, for the Constitution declares that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction; and the Act of Congress of 1789 provides that the District Courts shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction” (3 Kent Com. 337).

This broad construction of the admiralty power was supposed to be justified on the authority of the case of *Martin v. Hunter's Lessee* (1 Wheat. R. 304), where it is said that “the words ‘judicial power shall extend,’ &c., were imperative, and that Congress could not vest any portion of the judicial power of the United States, except in Courts ordained and established by itself.”

But more recently, this doctrine has been somewhat re-

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stricted in its application. Judge Story has given an interpretation to the Constitution not precisely in accordance with previous adjudged cases. He says, "the admiralty and maritime jurisdiction was intended by the Constitution to be exactly as extensive or exclusive, and no more so, in the national judiciary, than it existed in the jurisdiction of the common law; and that where the cognizance of admiralty and maritime cases was previously concurrent in the Courts of common law, it remains so (Story Com. Const. 533).

And this interpretation of the Constitution was referred to with approbation by Mr. Justice Campbell, in giving the opinion of a majority of the Court in the late case of the Royal Saxon.

So that we suppose, the authoritative doctrine, as to the concurrent jurisdiction of the State Courts of cases cognizable in the admiralty, is this: The State Courts may exercise the jurisdiction in cases of which the cognizance was concurrent in the courts of common law previous to the adoption of the Constitution; and this is the full extent of the concurrent authority of the State Courts; and further than this those Courts have no power to act in such cases.

On a contract for mariner's wages, the seaman, who has rendered the maritime service, may prosecute his suit against the master or the owner of the vessel, in the State Courts, under the common law forms of process, and in the common law modes of procedure; because in this way a competent remedy is furnished according to the practice and usages of the common law.

This is doubtless what was contemplated by Congress, in the saving clause inserted in both the Acts of 1789 and 1845, to wit: "Saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." This is a concurrent remedy with that which the seaman has in a Court of Admiralty, by process *in rem* against the vessel in virtue of his maritime lien, or by process *in personam* against the master upon the maritime contract.

But the State Legislature cannot confer admiralty jurisdic-

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tion upon the State Courts, or authorize admiralty proceedings *in rem* to enforce maritime liens. This power, by the Constitution, is given to the General Government, and its exercise confined exclusively within the jurisdiction of the Federal Courts.

It is, however, urged, that a *quasi* admiralty proceeding *in rem* is authorized, to enforce a maritime lien in the State Courts, by virtue of the additional saving clause in the Act of Congress of 1845, to wit: "And saving any concurrent remedy which may be given by the State laws, where such steamer or other vessel is employed in such business of commerce and navigation."

We had occasion, in the case of *Revenue Cutter No. 1* (recently decided), to notice the purpose and effect of this Act of 1845, and to trace the authority by which it was passed, to the provision in the Constitution which empowers Congress "to regulate commerce with foreign nations, and among the several States."

The framers of the law evidently proceeded with great caution, and with doubts and misgivings, as to the authority of Congress to pass the Act under the commercial power in the Constitution. And, indeed, it would seem inconsistent with the ordinary meaning of words, to call a law, defining the jurisdiction of the District Courts, a regulation of commerce. The jurisdiction of the Courts, and the regulation of commerce, are separate and distinct matters, having no necessary connection with, or dependence on each other. And the fixed constitutional limits to the judicial authority of the Federal Courts would seem to form an insuperable objection to this law, if its validity is made to depend upon the commercial power.

It was evidently this apprehension of the want of authority in Congress to pass the Act, and the consequent difficulties anticipated in the prosecution of suits under it, that induced the insertion of the provisions in relation to the trial of facts by a jury, and the reservation to the State Courts of the cogni-

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zance of cases that might (in matters of doubt) come under their jurisdiction.

It is very clear that this law was not intended to recognize, in the State Courts, the right, or to confer upon them the power to exercise admiralty and maritime jurisdiction; and for the simple reason that Congress, under the Constitution, has no authority to make the grant.

We now proceed to inquire into the effect of the libellant's suit and judgment in the State Court. Do those proceedings preclude his right to prosecute his claim and enforce his lien in a Court of Admiralty?

The libellant obtained his judgment in the State Court under and by virtue of the Act of the General Assembly of the State of Ohio of February, 1840, entitled "An Act to provide for the collection of claims against steamboats and other water crafts, and authorizing proceedings against the same by name." (38 Vol. Stat. 34.)

The first section of this law designates for what and whose account steamboats and other water crafts navigating the waters within and bordering upon this State, shall be liable, and as substantially re-enacted by an amendatory Act of April 12, 1858, reads as follows: "That steamboats and other water crafts, navigating the waters within, or bordering upon this State, shall be liable, and such liability shall be a lien thereon, for debts contracted on account thereof, by the master, owner, steward, consignee, or other agent for material, supplies or labor in the building, repairing, furnishing, insuring or equipping the same, or due for wharfage, and also for any damages arising out of any contract for the transportation of goods or persons, or for injuries done to persons or property by such craft, or for any damage or injury done by the captain, mate or other officer thereof, or by any person under the order or sanction of either of them to any person who may be a passenger or hand on such steamboat or other water craft at the time of the infliction of such damage or injury; Provided, that the lien by this section created shall only attach to vessels of twenty tons burden and upwards, enrolled and

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licensed for the coasting trade, according to the Act of Congress."

The second section provides, that any person having such demand may proceed against the owner or master, or against the craft itself; and the fourth section provides, that when proceedings are had against the craft itself, the process shall be by *warrant of seizure*.

The Act of March, 1848, explanatory of this statute, declares, that it shall be competent for a person holding a claim against any such vessel, to proceed against the vessel by name, "notwithstanding the cause of action may have accrued beyond or out of the territorial limits or jurisdiction of this State, and although such craft may not have been, at the time such cause of action accrued, navigating the waters within or bordering upon this State; Provided, that no claim or cause of action arising or accruing beyond or out of the territorial limits or jurisdiction of this State (under the provisions of the Acts of which this is explanatory), shall be permitted to attach or operate to the prejudice of any *bona fide* purchaser of such craft not having notice of the existence of such claim or cause of action." (46 Vol. Stat. 78.)

These Acts of the General Assembly of the State of Ohio are in derogation of the common law. They are without precedent as to forms of process, or in modes of proceeding in any practice or usage known to the common law. They afford remedies, which it is doubtless competent for the State Legislature to give upon contracts, and in relation to torts affecting water crafts within the State, and which are not subject to the admiralty jurisdiction.

But further than this, they can have no binding effect or legal operation. They can give the State Courts no jurisdiction over the mariner's lien for his wages upon vessels engaged in commerce and navigation between different States, or those engaged in the foreign trade. They purport to give the State Courts authority to proceed *in rem*, and to designate the order and priority of maritime liens in direct violation of the well-settled principles of the maritime law. They undertake to

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afford remedies which it is not competent for the common law to give, and those also which it is not within the province or jurisdiction of the State Courts to enforce.

Courts of Admiralty are careful to see that the mariner's lien is not destroyed by the proverbial improvidence of the sailor. And as this lien is a paramount claim upon the vessel, whoever owns such vessel, or how often soever the ownership may be changed, wherever she may go, and whatever may befall her, so long as a plank remains of her hull, the seamen are the first creditors, and she is privileged to them for their wages. Nor can this lien be affected or destroyed by any proceedings of the common law Courts. The purchaser, at a judicial sale under such proceedings, takes the property *cum onere*.

In the case of *Poland v. Brig Spartan* (Ware's R. 134), it was urged (as it has been insisted in this case), that where different creditors are each pressing their own rights against the vessel in different Courts, the rule should be, to give precedence to those who first lay their hands on the fund. And this was urged upon the plea of preventing a conflict and collision of judicial authority. The learned Judge of the District of Maine, in that case, held that, as the mariner's lien was privileged, its very essence was to give a preference over the general creditors of the debtor. And that if such be the claim of the seamen, the attachment (under the State process) only created a lien on the property subject to such prior incumbrance, and consequently could only create the right to hold the specific property after discharging the lien.

So, too, in the case of certain *Logs of Mahogany* (2 Sum. R. 592), Mr. Justice Story says, that "a suit in a State Court, by an attachment under process of the property, can never be admitted to supersede the rights of a Court of Admiralty to proceed by a suit *in rem* to enforce the right against that property, to whomsoever it may belong." "The admiralty suit (he says) does not attempt to enter into any conflict with the State Court, as to the just operation of its own pro-

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cess ; but it merely asserts a paramount right against all persons whatever, whether claiming above or under that process."

This doctrine is not at all contravened by the decisions of the Supreme Court in the cases of *Hagan v. Lucas* (10 Peters, 400), and *Taylor et al. v. Carryl* (20 How. 583).

The principle established by these cases is simply this: When property is seized by a sheriff, under process from a State Court, so long as it remains in his possession thus acquired and held, it is in the custody of the law, and cannot be again seized *when so held*, upon process issuing from a Court of another jurisdiction.

This is the full extent of the principle maintained by these cases. And in the latter case on the question of the right of the marshal to execute the process of seizure from the admiralty, and take a vessel thus held by the sheriff, the members of the Court were very near evenly divided in opinion, four of the judges insisting that the admiralty process was paramount in authority, and should be executed, notwithstanding the vessel was, at the time, thus in the custody of the law.

In the case before us, the libellant's claim for wages against the brig was not merged in the judgment obtained in the State Court under the Ohio water-craft law. Nor was his lien in any way affected by those proceedings ; and for the plain reason that his maritime lien was a right which the State Courts had no authority to enforce by a proceeding *in rem* ; nor was the lien itself a matter within the cognizance of those Courts. And hence, the judgment was void for the want of jurisdiction in the Court which rendered it.

The exception to the claimant's answer must, therefore, be sustained.

Decree for libellant.

DISTRICT COURT.
EASTERN DISTRICT OF MICHIGAN.

HON. ROSS WILKINS, DISTRICT JUDGE.

THE DOUGLASS.

MARCH, 1863.

COLLISION.—LOOKOUT.—SAILING VESSELS.—EVIDENCE.—ADMISSIONS.

In a collision between two sailing vessels, one close-hauled and the other with the wind free, the latter was held in fault for an insufficient lookout, and for failing to give way in time.

A lookout must be constantly at his post, and must not be interrupted in the performance of his duty.

But little credence can be given to the testimony of a sailor who contradicts statements deliberately made by him, in writing, immediately after the collision.

Great weight should be given to the admissions of the master of a colliding vessel, though not upon deck at the time of collision, who states to the injured party that his own vessel was in fault, and promises to pay the damages done by her.

LIBEL and cross libel for collision between the schooners Douglass and White Cloud, in the passage between Pointe au Pelée and Pointe au Pelée Island, in Lake Erie, on the morning of July 6th, 1861. The Douglass was bound from Oswego to Chicago, and at the time of the collision was sailing upon a W. N. W. course, having the wind free and nearly abeam. The White Cloud was at the same time bound down the lake, upon an E. S. E. course, close-hauled upon the star-board tack. The night was dark but clear, and lights could

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readily be discerned. It was averred on the part of the Douglass, that the White Cloud had no light and no proper lookout. This was denied on behalf of the White Cloud, and the fault charged upon the Douglass, that she had no proper lookout, and failed to give way as by law she should have done.

Mr. *J. S. Newberry*, for the White Cloud.

Mr. *W. A. Moore*, for the Douglass.

WILKINS, J. From the closest attention to the proofs on trial, and the application of the rule of law governing the facts unquestionably established, I am clearly satisfied that there was no fault in the White Cloud. In her navigation she kept her course as was her duty. She was heading E. S. E. on the starboard tack, by the wind, which was south, close-hauled, with a bright light burning, sufficiently admonitory to all approaching vessels that were vigilant and kept a proper lookout; her speed was about six miles an hour; a competent crew was on duty. The last fact has been unsuccessfully contested, and had it been otherwise, the incompetency alleged would be of no weight, beyond a mere presumption, clearly rebutted by the preponderance of testimony, as to her keeping her course until the very moment of collision.

But little reliance can be placed on the witness John Clancey, the lookout on the White Cloud, whose voluntary statement, reduced to writing a few days after the event, in the presence of his shipmates, fully agreeing with them in their account of the occurrence, does by no means, in this essential particular, correspond with his evidence as a witness on the stand. It is safer to trust to the narrative of a sailor, made when all the incidents were fresh in his memory, than condemn on testimony given a year subsequent, and after appliances brought to bear upon him, probably superinducing a contrary statement. Suspicion will attach under the circumstances, especially where he is brought to give evidence against his own vessel, impeaching the credit of his first story.

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No fault therefore can be attributed to the management of the White Cloud.

Had her crew been inexperienced, and that had produced the collision ; or if the wheelsman had been incompetent, and his unskillful steering had caused the calamity ; or if her light had been obstructed for a moment, which does not clearly appear, and in consequence she had run into the other vessel, such showing would place her in fault.

But such was not the case ; the vessel was managed well, her light was bright, and although the wheelsman was young and inexperienced, the rule of the road was strictly observed.

Incompetency or negligence must be such as to cause the collision, and fault cannot be imputed where the law of navigation has been followed.

This determination leads to the next question, viz : Was there fault in the Douglass ?

It occurred to the Court, during the progress of the trial, and from the evidence of the first mate of the Douglass, that such must be the conclusion reached, and that the proofs would not warrant a decree of inevitable accident.

In cases of this description, there is usually much conflicting testimony.

Hence the Court should exercise every caution in scrutinizing evidence, and sift as well as weigh the proofs.

On the night in question, the Douglass was sailing up the lake, bound from Oswego to Chicago, freighted with iron, and was passing through Point au Pelée, with a free wind, her course W. N. W., and her speed about seven knots an hour. Her captain had retired, leaving the charge of the deck with the first mate, White, and a competent wheelsman, lookout and deck hands, unsuspecting of danger. The mate was beguiling the passing hour with humorous narrative to the wheelsman, when his attention was suddenly called to the light of the White Cloud, and he ran forward exclaiming : " Where the devil is the lookout ? " In haste, he gave the necessary order to " hard up," but immediately reversed the same

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in the fright and confusion of the moment. His order to port was too late.

The peril of navigation by night, on ocean, lake and river, whether by steam or canvas, demands constant and uninterrupted vigilance. The officer of the deck is bound to be active; the lookout must be vigilant, and the wheelsman, who has charge of the helm, must not be disturbed in his duty. Their appropriate responsibilities are incumbent upon each, but the deck officer, for the time, supervises all.

The distraction or perversion of the attention of either lookout or wheelsman, by the master or mate, leading to a neglect of duty and consequent collision, places the vessel in fault, and makes the owner and master responsible. The duties of lookout and wheelsman demand constant vigilance. The one must give timely warning of approaching peril, and the other must be ready to respond to the appropriate order of the master of the deck. To the subordinates, in particular, are intrusted the lives and property on board.

Was this vigilance exercised?

The night was clear, wind favorable (a light southerly breeze), and objects at a distance easily discernible. Both vessels were on the same line, moving in direct opposition, and at a speed of six miles an hour. The Douglass, sailing with the wind, was bound to steer clear of the White Cloud; the latter was not discovered by either the mate, wheelsman or lookout of the Douglass, until she was twice her length off, and a collision inevitable.

No matter how experienced a sailor was the mate, White, or how trustworthy as a sober man, he neglected his duty at this crisis, and occasioned the neglect of duty on the part of others, until it was too late to escape the peril.

A vessel is not free from blame when either the important functions of a lookout or wheelsman are causelessly interrupted, and proper care by the commander will always forbid and prevent such interruptions. The duty of lookout implies vigilant and *constant* observation, which cannot be faithfully discharged if subjected to the slightest interruption.

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In determining the prominent facts, I have carefully considered the proofs on both sides and have no doubt as to those upon which the opinion is based. This was strengthened greatly by the declaration of Captain Turner, to Mr. H. N. Strong, on the 8th of July, twenty-four hours after the collision. Captain Turner was not on deck, his watch having expired a moment before the collision. When he retired he left all well, and therefore knew nothing of the incidents or cause of the disaster. His information was unquestionably received from his mate, and his judgment formed from his and the statement of others. His nautical experience apprised him where the fault lay, and with this knowledge, he calls on his arrival at Detroit, upon Mr. Strong, and states "that the Douglass was to blame; that he had written to his owners to that effect, and that he would be here and settle the damages. That it was the most lubberly piece of business he had ever known, and that his mate had seen the White Cloud light, which was a good one."

When Mr. Strong thus testified, I could not regard it otherwise than as a truthful though fatal admission of Captain Turner. Independent of the character and well-known respectability of the witness, his statement bore internal evidence of truth, not impaired by the denial of Turner, "That, to his recollection, he never made such statement." Mr. Strong is positive: Turner prevaricates. The one is unimpeached, the other is proved to have made contradictory statements to Captain Elsie, and his own account of the motives of his visit to Strong and Elsie, shake the credence which otherwise might have been bestowed upon his denial.

That he made the declaration, I entertain no doubt, and I think it settles the controversy.

The admission of a seaman of experience and intelligence, based upon the statements of his mate and crew, made at the very time of the occurrence, thus passing judgment upon his own vessel, and attributing the calamity to its mismanagement, render almost unnecessary further examination of the facts; for, who is better able to judge than such an expert with the facts fresh before him?

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But the proofs presented other points, and the Court could not withhold the expression of its opinion as to the character of the fault that makes the Douglass responsible.

Decree for libellant.

THE ZOUAVE AND RICH.

MARCH, 1864.

COLLISION.—DUTIES OF TUGS AND TOWS.

The contract of towage implies knowledge of the channel and safe pilotage. Good seamanship requires that vessels of heavy draft should be placed behind those of lighter draft.

An improper order given in a moment of imminent peril is no fault.

LIBEL by John Kilderhouse, owner of the schooner Arnold, against the tug Zouave and the schooner Rich. The facts sufficiently appear in the opinion of the Court.

Mr. *Alfred Russell*, for libellant.

Messrs. *J. S. Newberry* and *W. A. Moore*, for the Zouave.

Mr. *A. W. Buel*, for the Rich.

WILKINS, J. This was a collision on the St. Clair Flats, caused by the grounding of libellant's vessel by the tug Zouave, in consequence of which the Rich, which was second in tow, ran into her, occasioning considerable damage.

At the close of the evidence, I entertained no doubt as

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to the Rich, but deemed it best, as well as courteous to the counsel, to reserve an opinion until the entire case should be heard.

The Zouave had taken the Rich first in tow at the head of the river, when, subsequently, the Arnold, of greater draught, appeared, and by direction of the master of the tug, the position of the Rich was changed, and the Arnold was placed first and the Rich second. It is clear, that had the Rich been kept in her original position, there would have been no collision—she would not have been forced into the Arnold, and, therefore, the stranding of the latter, however it might have affected the other vessels in line, would not have occasioned the collision by the Rich. Having contracted for safe towage, the Rich was under the control and government of the tug, and her duty was simply to follow her lead, obey her direction, and faithfully submit to her guidance.

The contract of towage comprehends safe pilotage, especially through the perilous passage of the St. Clair Flats, where the channel is narrow and requires the greatest precaution. The contract embraces more than mere progress against adverse wind, or the supply of speed, when there is no wind. The tug is presumed in the undertaking she makes, to know the channel and all its perils, and engages to take her tow line safely through. It comprehends knowledge, caution, skill and attention. •

The proofs show that the Rich was of less draft than the Arnold, and had her position in line remained unchanged, she would not have stranded, whether or not the Zouave was in the channel. Placing her in the rear of the Arnold, was the act of the Zouave, with the presumed knowledge of the risk to be incurred, and not the act of the Rich.

But the Court holds further:

That there was no fault in the Rich as to the order given, even if, under the excitement of the moment, that order was improper. The peril was sudden and imminent. She was in great danger both in front and rear, with little, scarcely a moment's, time for consideration; and, as was strenuously urged

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and admitted in the case of the White Cloud, an improper order given under such circumstances, is not to be considered a fault. She had a full complement of men, and every man was at his post.

The tow line was going at the rate of five miles an hour. The danger was immediately perceived by the lookout of the Rich, immediately reported, and the order as immediately given. Neither is it so very clear that this order was not the best under all the existing circumstances. The Penfield was coming upon her, within 110 feet, and affording but a few seconds to her captain to determine how his vessel should escape from the danger in which she was placed by the stranding of the Arnold.

The expert testimony differs as to the proper order under such circumstances, yet the testimony of the officers and crew, also experts, under whose personal observation the facts occurred, is much more satisfactory and reliable on this question than that of others, however learned in the theory and practice of navigation, who were not present at the time, and could not see all the incidents as they actually occurred at the crisis. Hypothetical proof, though drawn from experience, is not as satisfactory in cases of this kind as the observation of experience on the spot and at the time.

But, be the order given strictly right or wrong, it was necessarily given on the instant, under great peril, and for self-safety, and, therefore, was no fault. It would be gross injustice to punish the Rich in damages, when the propelling power of the Zouave, the force of the current, and the stranding of the Arnold, placed her, unwillingly, in the great peril to which she was so suddenly exposed, and under which an order, at least of only doubtful propriety, was given. At best, it was scarcely possible for her, under the speed and space that has been established by the proofs, to escape being run into by the Penfield, running ashore, or colliding with the Arnold. Self-safety was with her the paramount law.

The case of the Morton has been cited. Though somewhat similar, it is not exactly this case. There was proof that

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the collision could have been avoided in that case by the proper management of the stranded vessel, and the Court then held, and now holds, that vessels in tow have duties to perform, the neglect of which, if causing a collision, would release the tug. They must exercise the proper care for self-preservation, obey the directions of the pilot, in emergency give proper orders, and are certainly not discharged by their contract from all duty. The Rich, as the proofs demonstrate in this case, was vigilant, prompt, careful and obedient, and the mere probability of her escaping a collision by a different order than that given, does not place her in fault. There must be a reasonable certainty to convict.

Releasing the Rich from the allegations of the libel, the Zouave must be held responsible, unless the collision was an inevitable accident, for I do not deem the Arnold in fault. Her crew was competent, she obeyed the orders of the pilot, followed her lead, practiced no deception as to her draught, and, when taken in tow, was open to the inspection of the master of the Zouave, who, knowing the channel and its depth, made his contract accordingly. Unavoidable accident is an event unexpected by human experience, not the act of man or man's agency, as a sudden storm of wind, or a stroke of lightning. Unforeseen peril, that which cannot be calculated by human science or experience, can only make a collision on lake or river an unavoidable accident. Such, certainly, was not the case here.

It is established by the proofs that the Arnold was the vessel of the greatest draft in the whole line, and therefore more apt, in shallow water, to run aground. Placing her first imperiled the rest as well as herself. She ought to have been placed last. This good seamanship required.

The master of the Zouave so testifies, but he omitted this very obvious duty so essential in order to secure the Arnold's safety. The collision occurred from her running aground, and had she been last instead of first, it certainly would not have occurred. This arrangement of the tow line was a primary

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fault in the tug, and independent of the other circumstances in the case, renders her liable.

In the contract of towage, the tug master is bound to arrange his vessels in tow, with the view of securing the safety of all with whom he contracts, and no reckless and unsanctioned usage on the part of tug masters will be allowed to modify such a salutary rule for the protection of life and property. Furthermore, the Court is satisfied from the proofs, that the Zouave was not in the proper channel when the Arnold stranded. She was too far to the eastward. The Naomi and the Two Fannies, of equal, if not greater draft, passed the Arnold to the westward, while she lay aground. She was pulled off to the westward when extricated, found water sufficient, and her mate states substantially that he ported his wheel shortly before the stranding, unquestionably with the view to keep in the channel, as she evidently was not then in the middle of the channel, but kept so close to its eastern border, if not outside, as to lose the depth of water necessary for the Arnold. This was not the skillful navigation for which she contracted. And, if before the collision, she was in the channel, there was no sufficient excuse for varying her course from the obscuration of the ranges. The wind was down the river, and if the ranges were obscured at all it was but for a short time that the obscuration existed. The master and the mate of the Rich state that the ranges were obscured but a few moments, and the tow carried no canvas. An unusual obscuration might excuse and make the collision unavoidable, but such a difficulty should always be anticipated and provided against by skillful tug masters, who should then slacken speed and proceed with greater caution.

Decree for libellant.

NOTE —The case of the Morton, cited in this opinion, was reversed on appeal. See *post*, p. 137.

The Nabob.

THE NABOB.

APRIL, 1864.

COLLISION.—RIGHT OF ALIEN OWNER TO SUE.—WHEN FORFEITURE BECOMES OPERATIVE.—TUG AND SAILING VESSEL.—LOOKOUT.

The fact that prior to the collision, an interest in the injured vessel had been transferred to an alien, and a forfeiture thereby incurred, does not prevent such alien owner from joining in the libel, the forfeiture never having been judicially declared by a condemnation.

A tug having vessels in tow, when meeting a sailing vessel, is subject to the rules applicable to ordinary steamers.

A tug having only a mate and wheelsman on deck is insufficiently manned. A lookout is absolutely necessary.

LIBEL and cross libel for collision. The libel was filed to recover damages from the owners of the Nabob, for colliding with and sinking the steamtug John Martin, the alleged property of the libellants. The schooner Nabob was on her voyage from Buffalo to Milwaukee. Having been towed out of St. Clair river into Lake Huron, on the evening of May 16th, 1863, she anchored in the lake for want of wind to continue her voyage. She remained at anchor until midnight, when she again started on her voyage up the lake, her course being north by west, for Pointe aux Barques. The tug John Martin, engaged in the business of towage, and in search of vessels in Lake Huron, took in tow the bark British Lion, a short distance above the village of Lexington, and about thirty miles from the River St. Clair, and headed for the river, designing to procure other vessels, which she expected on her way down, her course being south or about south half east, and four miles from shore. Just about daybreak she was run into by the Nabob, which struck her amidships, and so forcibly that she immediately went to the bottom.

It was further alleged and proved, that the tug John Martin having been duly enrolled and licensed, was in January, 1863, transferred in part by John Pridgeon, her owner, to

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William K. Muir, one of the libellants, who was at the time a subject of Her Britannic Majesty; that subsequent to her enrolment and license as the sole property of Pridgeon, libellants knowingly and unlawfully used such enrolment and license, together with the custom house certificate thereof.

It was also admitted upon the trial, that Pridgeon made oath at the custom house, in Detroit, that he and Muir were both citizens of the United States, and not subjects of any foreign power. This oath was not true, as Muir had never been naturalized, but had simply declared his intention to become a citizen, though Pridgeon had taken the oath under the erroneous impression that his declaration of intention had actually made him a citizen.

Messrs. *W. A. Moore, Wm. Gray, H. H. Emmons, Geo. Jerome* and *Geo. V. N. Lothrop*, for the libellants.

Messrs. *J. S. Newberry* and *Alfred Russell*, for the respondents and cross libellants.

Pridgeon and Muir, at the time of the collision, and at the time of bringing suit had no title to the tug John Martin. The title was in the United States.

(1) The evidence shows that John Pridgeon sold one-third of the tug (being then an enrolled and licensed vessel) to Muir, who was then a British subject. This forfeited the vessel (Brightly's Digest, p. 149, sec. 46; Act 1793, § 32; Brightly's Digest, p. 829, sec. 16; Act 1792, § 16).

(2) On April 28th, 1863, Pridgeon took and subscribed an oath at the custom house, stating Muir to be a citizen, which was not true, and obtained a new enrolment and license upon the oath. This forfeited the vessel (Brightly's Digest, p. 824, sec. 4; Act 1792, § 4).

(3) No title passed to Muir by the sale; he was a foreigner—incapacitated to receive a title to an American built vessel—consequently, as one of the joint libellants never had any title to the tug, the suit must fail.

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(4) Pridgeon's title was divested from him and vested in the United States at the moment of sale to Muir, so that neither libellant had title to their interest.

In *U. S. v. 1960 Bags of Coffee* (8 Cranch, 405), it was held that a sale to a *bona fide* purchaser for value without notice did not prevent condemnation (See also Conk. Treat. 3d ed. 526, and cases cited; *Gelston v. Hoyt*, 3 Wheat. 311; *Caldwell v. U. S.* 8 How. '366, 381; *McLane v. U. S.* 6 Pet. 427).

No proceedings to condemnation are necessary to effect a change of title—in fact the United States never get any record or paper title (*The Florenzo*, Blatch. & How. 52).

WILKINS, J. The severe penalty prescribed by the statute was undoubtedly intended to prevent false swearing in taking the oath necessary to obtain enrolment, and the fact that the oath was taken in haste and in ignorance that Muir had only declared his intention of becoming a citizen, would be no excuse in a prosecution for a forfeiture.

By the 7th section of the Act of 1792, in regulation of the coasting trade, the certificate of enrolment is to be solely used for the vessel for which it is granted, nor can it be sold or disposed of to any person whatsoever, but shall be delivered up under the circumstances described, to the collector of the district; and if any foreigner shall purchase the whole, or any part of the ship, the delivery of the certificate shall be made within seven days.

By the 16th section, if such sale be made to a foreigner, and be not reported and made known, such ship, her tackle, apparel and furniture shall be forfeited. This section clearly contemplates a trial before the forfeiture is incurred.

The proofs establish the fact that, previous to the collision, one-third of the John Martin was conveyed by Pridgeon, one of the libellants, to the other libellant Muir, and that Muir was not then, and is not now a citizen of the United States.

It is contended by the claimants that, by this alien owner-

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ship, the tug was *eo instanti* forfeited to the United States, and that one of the libellants having no title, this action cannot be maintained. The case of the *Mohawk*, though not exactly this case, was a proceeding for a forfeiture under the Act of 1792. There was, however, a subsequent purchaser, without notice and before condemnation, whose interest was involved in the controversy.

This, however, is a case of collision, by which a trespass was committed by the claimants, and for which damages are sought to be recovered. The *res*, though forfeited under the Act of Congress, yet that forfeiture never having been enforced by the Government, nor the vessel seized, it has remained in the possession of its alien owner. No information was made until the close of this trial, and the Government has since remitted the penalties. It is true the language, "shall be forfeited," is positive; but the forfeiture was never judicially consummated, nor the vessel condemned. It is true the libellants, being the transgressors, cannot plead want of notice or ignorance of the act whereby the forfeiture was incurred, but they were still in possession at the time of the trespass; no right or title had been asserted by the United States, which might never see fit to enforce the forfeiture; and, until the assertion of a claim, the *res* remains under the protection of those in possession, who, at least, have a *quasi* title that would sustain an action of trespass against a wrong-doer. Whether there was a forfeiture or not is an issue not to be tried in this case.

Under the Act of 1792, I am satisfied that no forfeiture is consummated until decree of condemnation. Where such decree is pronounced, it will, according to circumstances, modify or control subsequent transfers. The *Bags of Coffee Case*, 8 Cranch, 398, involved the validity of a sale after forfeiture, though the purchase was made in good faith before condemnation. The question arose as to the title of the purchaser as against the United States, and it was held the condemnation consummated the forfeiture. This case certainly does not apply to the facts now before the Court, as there has been no

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decree, and, by the act of the Government in omitting to prosecute, the owners implicated in the offence remained in possession until the collision.

The case of *Gelston v. Hoyt*, 3 Wheat. 311, simply exonerated the officer from trespass in making the seizure, but held him to respond in damages where no forfeiture was proved at the trial, and no certificate of probable cause given.

• In *Caldwell v. United States*, 8 How. 366, the rule is clearly stated, that the United States acquires no title by the mere forfeiture, but, in order to avoid sales between forfeiture and decree, the latter has relation back to the offence. There must be a consummation by judicial decree to vest title in any one as against the owners. If otherwise, how can the ship be protected? Is she to rot at the wharf until prosecution is commenced? Is she to be abandoned when no one claims her possession? When negligently damaged by others, who is to sue for recovery? What provision thus makes the vessel an outlaw? I do not think the Act, in directing a prosecution and trial, contemplates an instantaneous forfeiture upon the commission of the offence, and therefore hold that the libellants are rightfully in Court.

This collision occurred in Lake Huron, the Nabob being on a northerly course up the lake, and the Martin with her tow steering south by east, and bound for the River St. Clair. It is conceded that if the Nabob, being a sailing vessel, kept her course, she was not in fault, and the Martin is responsible. This is a simple question of fact. Much time was consumed in the examination of the proofs, as to the direction of the wind, though not with a view to an argument that if the wind was not free to the Martin, she is measurably exculpated. To such a proposition I could not assent for one moment.

The Martin was propelled by steam power, and, whether the wind was free or not, she must avoid a sailing vessel, the law considering the propulsive power of a steamer as tantamount to a free wind. But the direction of the wind becomes important simply in regard to the course of the Nabob at the time of collision; for if the Nabob, after weighing anchor,

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took her course after midnight north by west, with the wind west southwest, she had a free wind, and could easily keep her course ; but otherwise, if the wind was north of west. Upon this point the proofs were conflicting, and to so great and so painful an extent that the Court is compelled to believe that there is either willful perjury on one side or the other, or that the wind, within the period of half an hour, was most wonderfully capricious. There is great difficulty in the settlement of facts where the crews of antagonistic vessels come in conflict in Court.

Abeel, the second mate of the Nabob, swears that the wind was W. N. W. when he made the light of the tug, and he is followed by Byron, Clancey, Willes, and Bensly, of the crew of the Nabob ; while Barret, Allen, Dumass, and others, of the Martin and Lion, swear as positively to the wind being W. S. W. But it has been settled, in the case of the *Genesee Chief*, that the crew of the sailing vessel, as to the direction of the wind, is most entitled to credit. Hilson, the captain of the Nabob, whose calm and deliberate manner, as a witness, most favorably impressed the Court as to his truthfulness, says : "The wind varied in the space of one hour in four different directions, but that, near the time of the collision, it was W. N. W., free and steady, the Nabob keeping her course." This is a positive and credible declaration.

The testimony of this witness is so conclusive on the main point in controversy, that the Court has no hesitation in declaring, that, giving him credence, the libel must be dismissed.

He says that "he was towed out of the river a little after 8 o'clock in the evening, and was left by the tug Eagle a mile out in the lake, and the wind being light, he came to anchor. That he got under weigh again shortly after midnight. The wind was then light, from the southwest ; that he steered north by west. In a few minutes the wind hauled about to the northwest, and we headed then north by east. In a few minutes she came up north by west half west, and the wind was variable from that time until about two o'clock. It then

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settled into west northwest. I told the wheelsman if she would go as far as north by west half west, to let her go; if not, to keep her full and by. I was close by the compass, and noticed how she was heading at that time, about two o'clock. My watch commenced at midnight, with Abeel, Byron, and Clancey. Shortly after two o'clock I turned in, after giving the wheelsman directions to keep her on that course, which I also communicated to the second mate. I directed him to call me if he saw anything he did not understand. The wind was then west northwest, and my vessel was on her course at that time, and carrying a green light, all sails set except the square sail. We were on the port tack." This was when he left the deck.

Further, he says: "On turning in, I only took off my boots, coat, and hat. Afterwards the mate called me, and I came on deck with what clothing I had on. Heard the tug's whistle; saw her on my lee bow, about two points, and heading across my bow, going pretty fast, and about five hundred feet off, and I immediately ordered my helm hard up."

In response to a question propounded by the Court, this witness said:

"When I came back on deck, the Nabob was on the same course as when I turned in, and did not swing, or, if she did, she swung to the eastward." This is to the point. I repeat, then, if this witness is to be credited, the tug was in fault, and not the Nabob, because, 1st, the latter kept her course till the moment of collision; 2d, the Martin was heading across her bows; and 3d, his retiring from the deck, to obtain rest, and leaving the vessel in charge of the second mate, was not a fault contributing to the collision. If such neglect of duty caused the collision, or might have led to it, then it was such a fault as would have condemned his vessel. But he swears positively the Nabob was on the same course as when he left the deck, and, as positively, that the Martin was crossing his bows.

Aware of the importance of Captain Hilson's testimony, the libellants have undertaken to impeach his credibility; not

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on the ground of mistake or failure of memory, but for absolute corruption. Mistake in incidental particulars, or a failure of recollection as to collateral facts, or a disagreement between the witness and others as to material facts, will not impeach his credibility; but knowingly swearing falsely, or giving two different versions of the same transaction, must exclude the whole testimony from consideration. Now, Captain Barret, the master of the *Martin*, does not, in my estimation, so impeach the credibility of Hilson. Hilson swears he was on deck. This fact is not disproved by Barret's simply stating that he told him he was in bed. And, as to the conversation of which Barret testifies, it is but the adverse statements of the two masters, after the collision, when both were striving to exculpate their respective vessels, and under the excitement of the moment, when Barret's crew had been just rescued from drowning. He may or may not have made the statement; or, if made, and days after he denied it, his cool and firm denial of it in Court frees him from the taint of willful perjury. It is but witness against witness. And, as to the alleged contradiction by Abeel calling him after the tug's whistle, it is not so conclusive or satisfactory as to warrant the entire rejection of Hilson's testimony, for the tug may have whistled both before and after the captain was called. I pass by Swartwourt, as to the tow bill, and Enwright, as to the steeve of the bowsprit, as unworthy of serious attention, in this connection. The rule of impeachment is not of such an iron character as to condemn a material fact as false which corresponds with other proof, because other statements made by the witness have been, by the preponderance of number, successfully contradicted. Money has purchased—power sometimes overawes—and it will not do to weigh testimony by the multiplicity of the witnesses, especially in hotly contested admiralty cases. Difficult as it sometimes is, I have always endeavored to get at the facts, through the manner and matter of the witness. If he carries the appearance of integrity and candor, and his testimony is consistent with itself and all the surrounding circumstances, I cannot but yield my confidence, despite

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trifling discrepancies. The rejection of Captain Hilson's testimony, however, could not change the determination of the case. The law casts the burden of proof upon the master of the steamer who sues, to prove that his vessel exercised all proper care and diligence and prudence to avoid the collision. It will not do for the steamer to say that the sailing vessel was first in fault.

If the tug has violated the law and the rules of navigation, especially if such infraction be a primary omission or fault, she cannot recover, if the same has led to the casualty. Steamtugs are vessels propelled by steam. As such they are governed by the rules applicable to steamers; and as to precautionary regulations, having other vessels in tow and in peril, there is more reason for their strict observance by steamtugs than by steamers. The law in admiralty in regard to this is well settled. As early as the *Genesee Chief* (12 How. 463), it was declared by Chief Justice Taney, that "It is the duty of every steamboat traversing waters where sailing vessels are often met with, to have a trustworthy and constant lookout besides the helmsman." "And whenever a collision occurs with a sailing vessel, and no other lookout is on board but the helmsman, such omission is *prima facie* evidence that the collision was occasioned by her fault."

From this decision, in 12th Howard, down to the steamer *Louisiana*, in 23d Howard, there is one unvarying strong current of authority in the same direction; the last case making the rule more stringent in requiring proof of the competency of such lookout, and prescribing, as his station, the most suitable place for his observation. In the intervening case, in the 18th of Howard, the steamer was a tug, and the rule by Chief Justice Taney, in the 12th, applied by Mr. Justice Nelson, drawing no distinction between steamboats and steamtugs. Without referring to the other cases since the *Genesee Chief*—and they are numerous—the correct doctrine as to lookouts, thus collated and embodied is this: All vessels propelled by steam, navigating the highways of commerce, must have constant and vigilant lookouts, employed as such, and so stationed on deck

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as to possess timely and perfect observation of all approaching or passing vessels, so as readily to ascertain their courses and movements, so far as practicable under all the surrounding circumstances. By the proofs in this case, the mate, Allen, was the only lookout. He and the wheelsman were in charge of the tug at the time. Without reference to his competency, which has been assailed, I entertain no doubt that his gross neglect misled the tug across the bows of the Nabob, and caused the collision. A wheelsman is not a lookout. He cannot discharge that duty when steering by the compass. His attention is to his wheel and the compass—not over or beyond them. The mate, having the general command of the vessel, cannot perform lookout duty. He has the general supervision of the ship, and directs both the wheelsman and engineer. While so engaged searching for vessels, he cannot discharge the duty of lookout, as required by the law. This neglect, then, as to a lookout, was a fault, and, as such, if there was no other, must prevent a recovery by the libellants.

Libel dismissed and decree for cross libellants.

NOTE.—This case was *affirmed* on appeal to the Circuit Court.

THE PLANET.

APRIL, 1864.

COLLISION.—VESSEL AT ANCHOR.—ANCHOR WATCH.

A schooner lying at anchor with her sails up, in a channel 1,500 feet wide, was damaged by a steamer coming down the channel at the rate of 12 miles an hour, and endeavoring to pass between the schooner and another vessel which lay about 400 feet ahead of her. *Held* :

- (1) That the schooner had a right to lie where she did with her sails up, though there was a *puffy* wind.
- (2) That no anchor watch was necessary in the day time.
- (3) That the steamer was solely in fault for not giving the schooner a wider berth.

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LIBEL for collision. The facts conceded and the facts proved to the satisfaction of the Court were substantially these: The schooner *Stella*, of 176 tons burden, was pursuing her voyage from Buffalo to Milwaukee, when, for want of wind, she came to anchor at midday, in the St. Clair River, above Port Huron, about 400 feet from the American shore, the river being at that point about 1,500 feet wide, and the current nearly five miles an hour. The *Stella* was in company with another sail vessel called the *Elida*, and the wind, which had been rather light all the morning, failed them at noon, and died away altogether; so that at this time and place, neither vessel being able to proceed up the current, they came to anchor, the *Elida* some 400 feet in advance of the *Stella*, and about the same distance from the American shore. The *Stella* kept her mainsails up, as her anchorage was but a short distance from the lake, and she had every reason to expect being towed by the *Sarnia*, which was then gone to the *Elida* to attach her first to her tow. The river is about 1,500 feet wide at this place, and there was ample space for vessels ascending or descending to pass on either side of the *Stella*. While thus at anchor, the steamer *Planet* came down the river at a speed of twelve or thirteen miles an hour, heading down stream, passing on the starboard side of the *Elida*, and attempting to run between the *Stella* and the American shore, ported her helm, and with the power of the current and steam, in a few minutes after passing the *Elida*, ran into the *Stella*, occasioning the damage alleged to both vessels.

Mr. *W. A. Moore*, for the schooner *Stella*.

Mr. *J. S. Newberry*, for the steamer *Planet*.

WILKINS, J. Many witnesses swear to the wind being puffy and capricious, when but a few minutes before the collision the *Elida* and *Stella* were forced to come to anchor because the wind had died away. Another witness, on board

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the Forester, swears that he had seen from her deck the Stella ranging off and on all the morning, when it is unquestionable, and not denied, that both the Elida and Stella only reached their anchorage at noon. Some of the witnesses swear that the Stella swung and sheered while at anchor about one hundred and sixty feet, a statement certainly inconsistent with the admitted fact of the length of her chain and weight of her anchor. Such a breeze as would make her thus range was sufficient to take her at once to Lake Huron, without the aid and expense of a tug. The speed of the Planet, her size, and the consequent undulation of the water, forbade accuracy of observation by those on her decks, and would mislead the judgment of the most truthful.

On the part of the Planet, it is urged that the Stella was at fault, in being at anchor, with her sails up, and neglecting a watch at her helm. It was midday; the channel broad and deep—on the starboard and larboard sides—to the east and the Canadian shore, 1,000 feet, and to the American, more than 300 feet, with sufficient depth of water to within a few feet of the shore; the anchorage was only for a short time, and no necessity existed for a watch at the helm, no more than for a light at her bow, or for a watch and light when lying at dock in port. Such a requisite presupposes powerful steamers to be without government, and that sailing vessels must keep a lookout when at anchor in a channel 1,500 feet wide, in order to protect descending steamers from being run into by sheering.

She had a right to keep her sails up when at anchor, under the circumstances proved. Having ample room to pass on either side, if there was wind to make the Stella sheer, the Planet was, nevertheless, to take that into consideration, and avoid passing the Stella so near as to render a collision possible. A steamer must avoid a sail vessel when both are under weigh; much more should a sail vessel at anchor be avoided, even on the eve of departure, and when her sails are up. It is no excuse for the steamer—with ample space safely to pass—that the wind was puffy, and the anchored vessel so sheered as to run

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into the steamer, or cause the steamer to run into her. The fault is in the steamer; and the sheering of the sail vessel, whether caused by undulation or wind, does not shift the fault from the steamer to the sail vessel.

It is unnecessary to attempt to reconcile the conflict in the testimony as to the fact of sheering. Fish and Cottrel of the *Forrester*, swear to the ranging, and the crew of the *Planet* to the same fact—with much probability, as the undulation would cause some ranging, though not to the extent that the crew fancied, in their rapid flight down a current of five miles an hour, while the captain and crew of the *Stella*, and the master and mate of the *Elida* testify to the contrary, Merrill, the mate of the *Stella*, stating positively that he was on deck all the time the *Stella* lay at anchor, until the collision, except for a few minutes at dinner, when he was told the *Planet* was coming, and that the *Stella* lay all the time steady at anchor. A sailing vessel at anchor even with sails up, and about to start, must be carefully avoided by a steamer coming into port; and it constitutes no defence to the latter that the former sheered, so as to cause collision. The steamer must keep off. There is no doubt that there was some ranging in the *Stella*, for a short period, on the rapid approach of so large a vessel as the *Planet*, causing a corresponding undulation. But this ranging cannot be attributed to the wind. And whether she ranged or not, while at anchor, under the sudden puffs of wind playing on her sails, the *Planet* was bound to guard against the exigency, by taking a wide berth, either to the larboard or starboard. This she could do. This she ought to have done. Where there is ample sea room, a steamer must avoid a sail vessel at anchor, or under weigh, and the law imposes no duty upon the latter when anchored, as to an approaching steamer in daylight. At night, the usual light and watch are necessary, but in the day time, all the duty to avoid a collision is with the steamer. It is not allowable for the latter to run any risk as to the anchored vessel, or attempt the experiment of a dangerous proximity. Sailing vessels, especially when at anchor, enjoy the broad protection of the law.

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The fact has been established that with reference to the Elida, the Stella lay inside, and not outside, and not at a greater distance than five or six hundred feet below.

This fact being fixed in the judgment of the Court, the fault in the Planet is fixed. With space abundant on either side, it is inexcusable that she ported on passing the Elida, a movement that brought her inevitably across the bows of the Stella. If it was desirable to hug the American shore, she ought to have done so before she reached the Elida, and not after she had passed that vessel. Had she done so, the collision would have been avoided.

Decree for libellant.

NOTE.—On appeal to the Circuit Court, this case was *affirmed*. But see, as to necessity of anchor watch, the *Masters and Raynor, post*.

SIMMONS' CASE.

NOVEMBER, 1865.

SMUGGLING.—DEFINITION OF "WEARING APPAREL IN ACTUAL USE."

A person who goes to a foreign country for the purpose of buying clothing, is not within the provisions of sec. 8, of the Act of March 8d, 1857, providing for the free entry of "wearing apparel in actual use * * * of persons arriving in the United States," notwithstanding he wears the same in returning home.

INFORMATION for smuggling. From the defendant's admission to the collector, it appeared that being a resident of Washtenaw county, Michigan, on the 17th of November, A. D., 1865, he went from there to Windsor, Canada West, for the purpose of buying an overcoat for

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his son, a lad of eighteen, who accompanied him. It was purchased and put on by the young man; the father and son recrossed the river into the United States, the son wearing the overcoat, passed by the custom house, and when stopped by a custom house officer, who seized the coat, declared that they had no intention of entering the goods.

Mr. *Alfred Russell*, District Attorney, for the United States.

After a full argument of the question of law involved, the Court charged the jury substantially, as follows:

WILKINS, J. If the jury find the facts as stated in the testimony of the collector, I instruct you that the offense as matter of law is complete.

Section 5 of the Act of June 30, 1864, (Session Laws of 1864, page 207,) provides for duty on clothing, as follows:

"On clothing, ready made, and wearing apparel of every description, composed wholly or in part of wool, made up or manufactured wholly or in part by the tailor, seamstress or manufacturer, except hosiery, twenty-four cents per pound, and in addition thereto, forty per centum ad valorem."

The defendant relies upon section 3 of the Act of March 3d, 1857 (volume 11, Statutes at Large, U. S. p. 194), which provides for the free entry of "wearing apparel in *actual use*, and other personal effects (not merchandise), professional books, implements, instruments, and tools of trade, occupation or employment, of persons arriving in the United States."

In my view of the law, the overcoat, although on the back of the young man, was not in "*the actual use of a person arriving in the United States*," within the meaning of the exemption.

The *use* referred to in the statute is use *prior* to coming into the United States, by a person who has been abroad, or lived abroad, and who has not visited the foreign country for the very purpose of bringing in the clothing upon his body, with the design of thereby escaping the payment of duty.

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Otherwise a dozen men might cross repeatedly during the day, and bring over clothing enough on their backs to supply a clothing store.

Moreover, in all cases of wearing apparel in use, tools, etc., a free entry must be made at the custom house, and a declaration made under oath, in writing, bringing the party within the exemption. (See General Regulations Treasury Department, pp. 560, 600.)

I understand the practice is quite general of persons going to Canada and wearing back new clothes, sending the old ones by express.

This is in direct violation of the law, and if satisfied of the facts, your verdict should be guilty.

Defendant convicted.

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MAY, 1866.

NEGLIGENT TOWAGE.—EQUIPMENT OF TUGS.—LOOKOUT.—INEVITABLE ACCIDENT.

A tug, whose master also acts as pilot and engineer, is not properly manned. It is the duty of a tug towing a vessel through a narrow channel and encountering a snow storm so heavy as to obscure the sight, at once to stop and cast anchor.

The want of a competent lookout is a fault of the grossest description.

The opinion of the master and crew of a tug, that their vessel was properly managed, and that the accident was inevitable, is entitled to very little if any weight.

LIBEL for damages occasioned by negligent towage. The libellant, the owner of the schooner Swallow, brought his action to recover damages for careless and reckless towage across the St. Clair Flats in December, 1866.

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By the contract set forth in the pleadings and proofs, the tug agreed to tow the schooner safely from Algonac to New Baltimore, a distance of only 14 miles, employing competent power, skill, experience, and a knowledge of the channel, for such an undertaking at that season, and with the vessel as she then was. The tug ran her aground, a few hours after she had taken her in charge, on the morning of the 7th of December, and the libel alleges fault in the reckless and ignorant towage of the respondent.

The answer admits the grounding of the schooner, denies that it was the fault of the tug, but alleges that it was the mismanagement of the master of the schooner, after and while the tug was aground.

It appeared in evidence that the master of the tug also acted as pilot and engineer, and the mate was also serving in the capacity of wheelsman.

Mr. *J. S. Newberry*, for libellant.

Mr. *W. A. Moore*, for claimant.

WILKINS, J. From the answer the important fact is elicited that the tug ran out of the channel and got aground, and in consequence, the schooner, being attached to the tug, was also grounded, and in the hurry and confusion of such an incident, neglected to detach the line or to cast out an anchor.

Neither of these allegations, if clearly proved, would exonerate the tug—because, 1st, the captain of the tug knew the condition of the schooner before he made the contract, as to her active force in case of such an emergency; and, 2d, if his ignorance and incompetency ran the tug aground, he is not excused from responsibility as to the schooner, by her neglect to detach herself immediately from the tug, or stop her own progress by casting anchor. The contract was safely to tow her through the channel for 14 miles, under her then existing condition as to her crew and power of self-control; and it was

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the grounding of the tug that rendered such other but then unavailable help necessary for her safety.

This defense is, therefore, dismissed from consideration.

The business of towage is one of great importance in navigation, and, both in England and in this country, is governed by rules of justice and common sense as certain as those which regulate any other business. Experience and skill are implied in most contracts for work and labor to be performed. A carpenter is not a blacksmith, a tailor is not a lawyer or a physician, neither is a farmer a steam navigator. Holding one's self out as such, against the fact, is a fraud; and, where it embraces the skillful care of property and life upon the water, the fraud amounts to a crime.

My mind was strongly impressed during the hearing, that the father and brothers, who owned and had the control of this tug, had not the necessary experience as sailors to warrant them in entering into such a contract; and, though their presence on the witness stand was prepossessing and inviting of confidence, I could not give to their testimony that reliance which would lead to an acquittal from great blame. They ventured the Pass without sounding line or small boat, to feel their way, beset with obstructions, with no other instrumentality but a small pole to exhibit depth of water as they progressed, through a hazardous channel, and at the season of peril. The posts of duty were not sufficiently manned; three persons undertaking the duties at one and the same time, of master, engineer, wheelsman, and lookout, and the master, working the engine one moment, and then hastening to the bow to look ahead and about for the channel.

Neither can I determine the case in their favor on their testimony as experts. Their opinion, as to the correct management of their boat, should not be and is not reliable. They swear the blame away from themselves, and attribute it to the act of God, as an unavoidable accident—the result of a blinding snow storm.

Until the Act of Congress of 1864, forbidding the exclusion of interested witnesses in civil actions, I had resisted the adoption of the State practice, admitting such as competent, and

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clinging to the old common law rule as the safest and wisest. When such testimony is offered to a jury, the Court has nothing to say, but, as the *credibility* of witnesses in admiralty is a question for the Court, I frankly declare that I will give to such testimony very little confidence, and, more especially where it is but the mere opinion of the witness—under oath, it is true, but a swearing away of personal liability. The yarn spun by sailors, assuming the solemn dignity of testimony, must always be received with caution, and scrupulously sifted, however carefully woven. Sailors will, from habit, compare notes with each other, and where there is a minute exactitude of agreement in narrative, it will lead to suspicion. But the Armstrong brothers and their father were not educated seamen, or so far experienced in the business as to justify the rejection of their statement, simply on that ground. Their concurrent opinion, however, is open to a different objection.

With honorable men—and I know nothing to the contrary but what this father and these brothers are such—interest will not lead to the manufacture of falsehood, or the suppression of truth; but, in ninety-nine cases out of one hundred, such a relation to the case obscures the judgment, and generates mistake. The question of fact is, whether or not the incident was an unavoidable accident, the snow drift blinding the vision of the tug's master and wheelsman, and their judgment that it was so cannot safely be made by the Court the basis of its decree in their favor. The occurrence was either an unavoidable accident or the fault was in the tug. The proof exonerates the Swallow. She was to follow, not to lead the tug. The tug first ran out of the channel, and then aground. This caused the Swallow to swing and get aground. Had the tug kept the channel, neither the tug nor schooner would have got aground. This is clear. But whether she ought to have cast her anchor after the tug was aground, does not affect the question of blame. It is not probable that it would have prevented her grounding; she had not a competent crew to do it, and this the tug's captain well knew when he entered into the contract to tow her through the channel, only 14 miles, in

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daylight. There was no fault in the Swallow, and her swinging to and fro in this narrow channel, and running into the bank, was caused by her tug pilot running herself ashore.

Was it an unavoidable accident? This would excuse. Man is not held responsible for the act of God. But the proof of this must be clear, direct and unquestionable.

There was a snow storm while the vessels were in the channel. If it was such as to blind the vision, it was the duty of the tug to stop and await its abatement. Was such the conduct of the captain?

He swears, on folio 95: "I did not stop entirely, because I wanted to preserve steerage-way until it cleared up," and "I ran about ten minutes after the snow storm had set in, and did not sing out to stop until my father, by a pole, discovered that we were out of the channel, and the schooner in danger."

If, then, the storm was such as they describe, anchorage or stopping the engine was an imperative duty. Ten minutes' run, or a mile, under such circumstances, was imperiling the safety of the schooner, and a gross fault on the part of the tug.

The appellate Court, in the case of the Morton, emphatically establishes the rule, that under such incidents the duty of the tug is forthwith to resort to other measures of precaution and prudence to protect her tow, either by slowing, stopping, or sounding.

"The tug," says Mr. Justice Swayne, "has no right to dash blindly on, and incur danger she neither knows nor can avoid."

If danger threatens, to stop at once is her duty. Where the vision is obscured, in the navigation of a narrow channel, there is imminent danger, and to continue the course, and not stop, is such negligence as makes the tug responsible for the consequences. The alleged storm cannot protect them; their own folly condemns, and that is not inevitable which can, by common prudence, be avoided.

Although sufficient reason is adduced, in the foregoing considerations, for the rendition of a decree for the libellant, I deem it proper to remark, as an admonition to tug masters,

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that this and the appellate Court have determined that, if the catastrophe in these cases can be at all attributed to the want of a proper lookout, such destitution will of itself render the tug liable. Such is the law in this District, and governing the navigation of these contiguous lakes. It is idle to say that the business will not warrant the expense, or that the captain and wheelsman can, on these boats, keep up a sufficient lookout. Recent exposition of the law declares otherwise; and tugs, engaged in towing most of the time property only, are as much required to have competent lookouts as larger steamers, intrusted with the care of human life. A lookout is a functionary in navigation, with duties distinct from the captain, or mate, or wheelsman, and neither of the latter class can supply his place and attend properly to his own specific charge. As well might the captain work the engine, or the engineer manage the wheel, as either engineer or captain keep up a constant, vigilant lookout. It is true, life is more precious than property, and its protection ranks higher in the law, but admiralty makes no preference in administration, and casts its ample ægis over both.

In the *John Fretter*, Judge Swayne says: "Where there is no lookout, the fault is of the grossest character, and every doubt relating to the consequences is to be resolved against the tug. It is impossible, in the nature of things, that the captain can perform properly his other duties and also that of the 'lookout,' and he must not attempt it. A crew is not competent without a lookout, either on tugs or steamers. If there be none, the tug cannot avoid her responsibility by the oaths of the captain or crew, if there be the slightest doubt as to the spring-head of the catastrophe."

Such is the strong language of the appellate Court, and I am sure, as now constituted, will never be modified. Of this our tug-owners may be certain. If the damage accruing can by possibility be attributed to this cause, the essential allegation of a competent crew is disproved, and the oaths of the captain and crew will be received with suspicion.

The proofs in this case establish the fact that the mismanagement of the tug and the ignorance of the channel caused

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the libellant's vessel to run ashore, and a competent lookout; acquainted with the channel and its banks, might have avoided this grounding, notwithstanding the alleged storm.

Piloting a vessel through a narrow channel, although for a short distance, in stormy weather, demands a full crew—master, lookout, wheelsman and engineer—each of whom shall be at their posts; and the lookout cannot be dispensed with, and is as essential to avoid collision with natural obstructions as with other vessels.

Collating, then, in a condensed form, the answer and the reliable proofs, the following facts are prominent, incontestable and conclusive:

1. The Armstrong, having the Swallow in tow, first got out of the channel, and first ran aground.

2. The contract was for safe towage, and implied a knowledge of the channel, of the condition of the schooner, and the shifting peril of the weather.

3. There was not sufficient time to detach the tow, or to cast anchor, so as to secure the schooner in the channel.

4. To detach the schooner, by cutting her tow-line, would have, from the narrowness of the channel, and the ignorance of her captain of its banks and breadth, most certainly have run her ashore.

5. The tug continued her course for some minutes after the snow storm had commenced.

6. Instantly stopping might have avoided the catastrophe.

7. The crew of the Armstrong was incompetent for the peril encountered, either for safety or extrication.

The grounding of the tug proximately occasioned the grounding of her tow, and if the first could have been avoided by ordinary care and forecast, the proximate was not overruled by any paramount power. If the storm was foreseen, and its peril could have been avoided, the responsibility is with the tug, and cannot properly be ascribed to "a blinding snow storm."

Decree for libellant.

NOTE.—Upon appeal to the Circuit Court, the decree in this case was affirmed.

CIRCUIT COURT.
EASTERN DISTRICT OF MICHIGAN.

HON. NOAH H. SWAYNE,
ASSOCIATE JUSTICE OF THE SUPREME COURT.

THE MORTON.

**COLLISION.—DUTY OF TUGS IN THE ARRANGEMENT AND MANAGE-
MENT OF TOWS.—PLEADINGS.—AMENDMENTS.**

A tug is bound to the exercise of ordinary care in taking up, arranging and managing the tow.

Having full control of the vessels towed, she must direct as to the length of their lines, the order in which they shall be towed, and prudence requires that the heavier draft vessels should be placed behind those of lighter draft.

The tug is bound to know the channel, and to keep the tow in the deepest water. If the ordinary lights or landmarks are obscured, the tug should provide for the emergency by slowing or stopping the engine, and sounding the channel.

The vessel towed is bound to prevent a collision, if she can, or to make the damages as light as possible.

The allegations and proofs must coincide; and the Court cannot consider evidence not in accordance with the issues made by the parties.

The Court will allow amendments upon terms even on the hearing of an appeal.

LIBEL for collision. On the 30th of June, 1863, the tug Morton, Kimball master, was coming down St. Clair river, having in tow the four following vessels in their order: Superior, drawing 11 ft. 4 in., Chase master; Vanguard, 10 ft. 4 in., Davis master; Yankee and Bermuda. At sundown, they passed Jerry's Ranch and the range lights on the flats just after they were lighted. Before passing the lights, the Superior and Vanguard, which were carrying part of their sails, took all the sails in. The depth of water on the flats at the time and dur-

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ing the season was 12 ft. 6 in. or more, and vessels of that draft constantly went through in safety. The deepest water was to the westward of the range. The tug, before reaching the end of the dredged channel, got too far to the eastward and stranded the Superior. The master of the Superior sang out to the Vanguard an order to starboard and then to port. The latter order was immediately obeyed by the Vanguard. The tow line from the Superior to the Vanguard was about thirty fathoms long or the usual length. The Vanguard swung slowly, and struck the starboard quarter of the Superior with the bluff of her port bow, and drove her over the shallow place into deep water, and caused the injury complained of. The tug gave the vessel no warning and did not sound the channel or slow, stop or back her engine. The captain, mate and wheelsman were attending to the navigation of the tug. She had no lookout stationed forward. On the trial in the District Court, the libel was dismissed, and the case appealed.

Mr. *J. S. Newberry*, for the appellant.

Mr. *W. A. Moore*, for the appellee.

An oral opinion was delivered substantially in the following language:

SWAYNE, J. In this case it is alleged on the part of the libellants:

That there is no issue tendered by the pleadings as to any fault committed by the Vanguard, and no fault charged upon the Superior as to her conduct;

That the proofs taken in regard to an issue not tendered by the pleadings are inadmissible, and should not be considered by the Court.

The rule is well settled, that the allegations and proofs must coincide, and that the Court cannot look outside of the pleadings to consider evidence not in accordance with the issues made by the parties (2 Conk. Ad. 245-250; *McKinley v. Morrish*, 21

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How. 343; *The Rhode Island*, Olcott, 505; *The Oregon*, Newb. 504; *The Boston*, 1 Sum. 329; *The Sarah Ann*, 2 Sum. 206).

It is equally well settled, that in order that substantial justice may be done, the Court will allow amendments to be made, even at the hearing of an appeal, taking care that no injury be done to either party. And in case injury should be likely to ensue from allowing amendments, the case would be continued, to allow the party to take such evidence as he might deem material on the new issue (*The Sarah Ann*, 2 Sum. 206; *The Boston*, 1 Sum. 329).

In the view I shall take of this case, however, it will not be necessary to continue the case, but I shall consider the evidence precisely as if the amendments that the party might make were already made.

In regard to the responsibility of tugs, when taking other vessels in tow, we hold that they are bound to use ordinary care and diligence in taking up, arranging and managing the tow, according to the exigencies of the business.

That while engaged in such business, tugs, as well as passenger steamboats, are bound to have a competent lookout properly stationed and vigilantly employed.

That in this case it is not certain that the collision was occasioned by the absence of such lookout.

That the tug has the full government and care of the vessels towed; she must direct as to length of lines; the order in which they shall be towed; that good management and common prudence require that the heaviest draft vessel should be placed aft of those of lighter draft; and had that precaution been observed in the present case, the present collision would not have taken place.

That ordinary care on the part of the tug requires them to know the channels through which they undertake to tow vessels, and where it appears there was a good draft of water, the tug is bound to keep in it. In this case there was 12 ft. 5 in., while the Superior was drawing only 11 ft. 6 in. Vessels drawing 12 ft. 4 in. went through that channel in safety the

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same day. It is clear that the tug got too far to the eastward, and thereby stranded the Superior, and was in fault therefor.

Again, if for any reason the ordinary ranges, lights or landmarks are obscured, it is clearly the duty of the tug to take such other precautions as may be necessary, either by slowing, stopping or backing the engine, or sounding the channel. She has no right to dash blindly ahead, and rush into dangers she neither knows nor can avoid (*The Rose*, 2 W. Rob. 3; *The Birkenhead*, 3 *Id.* 76, 81; *The Perth*, 3 Hagg. 414; *Chamberlain v. Ward*, 21 How. 548).

Upon these considerations we hold the tug in fault, and grossly so. But this would not necessarily make the tug liable for the entire damages, for the Superior may also be in fault.

The vessel in tow had also duties to perform.

She is bound to prevent the collision if she can; and if she cannot, then she is bound to make the damages as light as possible.

This is a rule of universal law (*Abb. on Shipp.* 154, 341; *Heckscher v. McCrea*, 24 Wend. 304; *Taylor v. Read*, 4 Paige, 571; *Emerson v. Howland*, 1 Mason, 51; *Miller v. Mariners' Church*, 7 Greenl. 51).

It is alleged that the master of the Superior gave the order first "starboard," then "port," and that the master of the Vanguard repeated the orders in the same way.

The experts show very clearly that the proper order in this case was "port," and that the contradictory orders would probably lead to confusion. Yet Davis, the master of the Vanguard, and others, swear that the orders were given in instantaneous succession, and that the only order obeyed on his vessel was the order to "port;" that the helm was immediately put to port.

In considering the weight of evidence, it is a well settled and sound principle of construction that the direct evidence of what was done on one vessel is of much greater weight than the hypothetical evidence of experts or others giving their opinions as to what was done.

Even if it was shown that a wrong order was given and

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obeyed, either on the Superior or Vanguard (which is not shown, however), under the exigency of the circumstances and light of authority, it could not be considered a fault (*The Genesee Chief*, 12 How. 461).

We can find no fault on the part of the Superior or the Vanguard.

But even in this case, were there fault on the part of the Vanguard, it would not prevent a recovery on the part of the owners of the Superior (*The New Philadelphia*, 1 Black, 62).

The decree below must be reversed, and the cause referred to a commissioner to compute the damages.

Decree reversed.

THE DETROIT.

JUNE, 1874.

PRACTICE.—AMENDMENT OF LIBEL.—STATE CLAIM.—RIGHTS OF
BONA FIDE PURCHASER.

A Court of Admiralty has no power to permit a libel to be amended by striking out the name of a sole libellant and substituting another in its place. Such amendment is virtually the institution of a new suit, and discharges the sureties upon the stipulation.

It is the duty of the claimant, however, to put his objections upon the record, and unless he does so, he will be deemed to have waived them by appearing, examining witnesses, and contesting the case upon the merits.

A claim for towage accrued against a vessel in May and June, 1865, while she was in the hands of a person who had contracted to purchase her. Having failed to fulfil his contract; she was returned to the owner who took her to Canada within a month or two after the services were rendered, where she remained until June 27th, of the following year. She was there resold to a *bona fide* purchaser, without notice, who brought her within the jurisdiction of the Court, and kept her during the remainder of the summer. On October 6th, the libel was filed and the vessel attached.

Held, That the lien was waived and the action could not be maintained.

A *bona fide* purchaser under a bill of sale does not lose the protection of the law by taking the collateral guaranty of a third party, indemnifying him against liens.

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On appeal from the decree of the District Court dismissing the libel. The action was brought to recover for the services of the tug *Young America*, in towing the barge *Detroit* to and from Bear Creek, in Canada. The libel was originally filed in the name of John K. Harrow, who was supposed to be the owner of the tug. After answer filed and the testimony of one witness had been taken, it was discovered that James P. Harrow was the owner of the tug at the time the services were performed. Upon an affidavit that the proctor had been misinformed at the time the suit was commenced, an amendment was permitted, substituting *James P.* for *John K. Harrow* as libellant. A motion to vacate the order permitting the amendment was afterwards made and denied. Claimant thereupon appeared, took testimony, cross-examined witnesses, and contested the case upon the merits, without further objection to the amendment.

The towage services in question were performed in May and June, 1865, the barge being then in the hands of one McDonald, who held her under an agreement to purchase of one Kean, the owner. On July 14th, 1865, McDonald having failed to perform his contract, Kean took possession of her and had her towed to Canada, opposite Detroit, where she underwent some repairs. It appeared that about August 30th, she was towed back to Detroit, where she remained a very short time, and was then taken back to Canada and laid up for the remainder of the season. In the autumn of 1865, the bill was sent by Harrow, who lived at Algonac, forty miles from Detroit, to one Kanter, at Detroit, with instructions to collect. Some time before the return of the barge, Kanter made a demand on Kean who returned an evasive answer.

On June 27th, 1866, the claimant, Alger, went to Canada with Kean, bought the barge there and brought her over to Detroit, where she was thoroughly repaired. A negotiable note at four months was given for the purchase money. The bill of sale which was not given until August, contained a special warranty by Patrick E. Kean against all liens, and a collateral guaranty to the same effect was given by his agent,

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Michael B. Kean. The libel was filed and the barge attached October 6th, 1866.

Mr. *H. B. Brown*, for libellant.

But sixteen months elapsed from the time the claim accrued until the barge was attached; of these, eleven months were spent in Canada.

If the barge had not changed owners there could be no pretense of a State claim (*The Nestor*, 1 Sum. 85; *Jay v. Allen*, 1 Sprague, 130; *Brown v. Jones*, 2 Gall. 477; *The Sarah Ann*, 2 Sum. 212; *The Buckeye State*, 1 Newb. 111; *The Merrimac*, 14 Wall. 653).

Where the vessel has changed hands, the questions to be considered are:

First. Whether the libellant has used due diligence. Was the claim enforced within a reasonable time, considering all the circumstances of the case (*The Bark Chusan*, 2 Story, 468; *The Rebecca*, Ware, 212; *The Lillie Mills*, 1 Sprague, 307; *The Eliza Jane*, *Ibid.* 152; *The Dubuque*, 2 Abbot, U. S. 33; *The Atalanta*, *post*).

The facts of this case, with regard to the diligence used, are not unlike those in the case of *The Bolivar*, Olcott, 480.

So far as the claimant Alger is concerned, the case stands precisely as if the libel had been filed on the day she was brought over from Canada, because he purchased her there, *and no change of circumstances took place from that time to the day of filing the libel.* She was brought over as *his* property, sold to him on four months' credit, which did not expire until after the libel was filed. Deducting her absence in Canada, but five months elapsed from the time the claim accrued until the libel was filed. Reckoning the time she remained here after her return, less than four months elapsed, either of these being sufficient to take the case out of rule in the *Buckeye State*, where it was held that as against *bona fide* purchasers, the libel must be filed within a year.

The time of her absence should of course be deducted

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(*The Sarah Ann*, 2 Sum. 212; *The General Jackson*, 1 Sprague, 554).

Second. Whether the allowance of the claim will work an injury to innocent purchasers.

I submit the question is not simply whether the vessel has passed into the hands of a *bona fide* purchaser without notice, but whether such purchaser will have to pay the claim out of his own pocket. The Court will look at all the circumstances of the case, and if it finds the purchaser amply protected, will hold the vessel responsible. This distinction is noticed in the case of *The Louisa* (2 W. & M. 62). In the case of *The Utility* (Bl. & How. 224), the Court indicates an opinion that if the purchaser protects himself, the libellant will also be protected.

In the case of *Cole v. The Atlantic* (Crabbe, 440), the Court enforced a claim against a *bona fide* purchaser, after the lapse of two years, because the libellant had used due diligence, and the purchaser was indemnified.

Injury to third parties seems also to be made the test in case of *The Canton* (1 Sprague, 440), and also in that of *The Buckeye State*. In this case two special guaranties against these liens were taken from responsible parties, one of whom signed the stipulation to answer judgment, and it is not claimed that a decree for payment would work any actual injury to Alger.

The amendment substituting one libellant for another was within the discretion of the Court (*Jennings v. Springs*, 1 Bailey's Eq. 181).

Even if it were not so, the claimant has waived the objection by appearing, taking testimony, noticing the case for trial, and litigating on the merits for eight years without objection.

Mr. *F. H. Canfield* for the claimant.

(1) No attempt is made to contradict claimant's testimony, that he is a *bona fide* purchaser without notice. The fact that the bill of sale contains full covenants of warranty, does not deprive the purchaser of the protection which the law affords

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him. Indeed a quitclaim deed is considered strong evidence that the vendee is not a *bona fide* purchaser (*Oliver v. Piatt*, 3 How. 333; *Lowry v. Brown*, 1 Cold. 456).

To sustain libellant's position is to subject the purchaser under covenants of warranty to the expense of two suits: 1st, to defend the claim; 2d, to recover from his warrantor.

(2) Libellant's claim is stale. The services were rendered not to Alger nor to Kean, but to McDonald, who held the barge under an agreement to purchase.

The general rule with regard to laches, is stated in the following case (*The Dubuque*, 2 Abbott U. S. 33).

It is only a statement of a general principle of law, that, as between two parties, a loss must be borne by him who might have acted and neglected to do so. Claimant has been guilty of no laches. If he pays, he suffers a loss which libellant might have prevented by acting promptly. Had proceedings been instituted before August 16th, when the bill of sale was given, claimant might have protected himself by refusing to accept it until the claim was paid. (*Blaine v. Ship Carter*, 4 Cranch, 328; *The Buckeye State*, 1 Newb. 111; *The Eliza Jane*, 1 Sprague, 152; *The Paul Boggs*, *Ib.* 369; *The General Jackson*, *Ib.* 554; *The Dubuque*, 2 Abbott U. S. 20; *The John Lowe*, 2 Ben. 394; *The Favorite*, 1 Biss. 525.)

An oral opinion, substantially in the following language, was delivered by

SWAYNE, J. The libel in this case was originally filed by John K. Harrow, but, by an amendment allowed under an order of the District Court, the name of James P. Harrow was substituted. It was not a mere mistake in the name of the libellant, but an actual change of one person for another. I think there was no authority to make this order. It was decided by the Supreme Court, in *The Commander-in-Chief* (1 Wall. 43), that new parties may be added, and parties improperly joined may, on motion, be stricken out, but I do not think this authorizes the substitution of one sole libellant for another. It is, substantially, the institution of a new suit.

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Clearly, this could not be done at common law, and I know of no authority for this practice in equity, except the one cited from Bailey's Reports, which rests upon different principles.

If the claimant, after having objected, and asked to have the order vacated, had stood by his objection and refused to proceed further in the case, or if he had put his exceptions on record, showing that he had done everything in his power to insist upon them, I should have held it fatal in this Court. But I think, by appearing, taking testimony and cross-examining witnesses, arguing the case upon the merits, and conducting the litigation for nearly eight years without observing any of the forms to which I have adverted, the objection must be deemed to have been waived. By appearing and contesting this new suit upon the merits, the claimant is now precluded from insisting it was not properly commenced. The effect of these proceedings upon the sureties, it is not necessary here to discuss.

There is a controversy between the parties, whether the barge was taken to Canada on the 14th of July or on the 31st of August, but I do not regard it as material to the disposition of this case. The services having been rendered in May and June, the libellant cannot be considered in default for failing to prosecute his claim before the 31st of August, assuming her to have been removed upon that day. She remained at Windsor, opposite and in sight of Detroit, until the 27th of June, 1866, when the claimant Alger went to Canada, purchased her, and brought her to Detroit, where she was put into a dry dock and largely repaired. This libel was filed and the barge attached on the 13th of October, 1866.

The question to be considered is whether this delay is to be deemed a waiver of libellant's lien as against Alger. It is said he is not a *bona fide* purchaser, by reason of the warranty contained in the bill of sale and the collateral guaranty given by M. B. Kean. I seems to me, however, that the answer of Mr. Canfield is entirely conclusive upon that point. It is held in the authorities upon that subject, that the very fact that a vendee accepts a quitclaim deed, is strong evidence that he is

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not a *bona fide* purchaser, and such I conceive to be the law. I do not understand that a person, by taking the warranty of his vendor, or of a third party, loses the protection of the law applicable to *bona fide* purchases.

The services were rendered while the vessel was in possession of McDonald, under a claim of ownership. So far as it appears from the testimony, the barge was his, and he was its agent for all purposes. After he had failed to complete his purchase, and the vessel was surrendered to Kean, he was entitled to be advised that such a claim was owing by McDonald when he might possibly protect himself against it, and it is proven in this case that a demand was made upon him for payment some time during the following autumn. Had libellant failed to give this notice before the close of navigation, I should have held the barge discharged of the lien while in Kean's hands. But it seems to me this was not libellant's only duty in the premises.

The season of navigation closed and winter passed. On the 27th of June, 1866, the claimant Alger went to Windsor, where the barge was lying, purchased her, brought her to Detroit, and placed her in Jones' shipyard, where extensive repairs were commenced. Libellant was bound to know all this. He certainly could have learned it by observation or inquiry. Yet he allowed the months of July, August and September to elapse without taking a step to enforce his claim. Not until the 6th of October, was his libel filed and the vessel attached. During all this time the title was vested in Alger. Now, as a question of law, was this reasonable diligence? The main authorities upon the subject have been read and I fully concur in their reasoning.

In the cases of the *Buckeye State* (1 Newb. 111), and *The Dubuque* (2 Abbott's U. S. 20), a rule applicable to the lakes is laid down, that where the vessel has passed into the hands of a *bona fide* purchaser, claims of this character should be prosecuted within the current season of navigation, or, at least, within a year. I think this rule is founded upon the most solid considerations of good sense. Granting there were

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no laches in this case before the close of navigation, as the vessel was all this time beyond the jurisdiction of the Court, I think it was incumbent upon libellant to keep a careful watch upon her movements, to notify the purchaser of his claim as soon as she was sold, and to proceed to enforce his lien as soon as she was brought within the jurisdiction of the Court. He was bound to know that this vessel was as likely to change hands as any other, and should have used diligence to ascertain when she was transferred to Alger, and have given him speedy notice of his claim in order that he might lose no opportunity of protecting himself against it. Instead of this, he allows the three busiest months of the season to elapse without making known its existence. I think these facts warrant the presumption that the lien was waived.

Upon the best consideration I have been able to give to the case, I feel constrained to affirm the decree of the District Court.

Libel dismissed.

DISTRICT COURT.
EASTERN DISTRICT OF MICHIGAN.

HON. ROSS WILKINS, DISTRICT JUDGE.

THE JOHN MARTIN.

MAY, 1866.

WAGES.—AUTHORITY OF ENGINEER.—FORFEITURE.

The engineer of a steamboat has no authority to make any alteration in the engine at the home port without the consent of the owner, and his conduct in so doing will work a forfeiture of his wages.

LIBEL *in personam* for wages as engineer upon the tug John Martin, then employed in towing vessels upon Detroit and St. Clair rivers.

ANSWER that libellant, without the knowledge or consent of the master or owner, removed certain portions of the engine and machinery from the tug, and greatly damaged the same, whereby the tug was delayed at Detroit for two days, and respondent suffered damage to a greater amount than the wages claimed to be due.

It appeared upon the trial that libellant, who was an experienced engineer, was dissatisfied with the construction of the engine in some minor particulars, and suggested to the master a change in the cut-off quadrant, and reversing lever that would render the engine safer and more manageable. The master did not give an express assent to the alteration, but made an evasive answer which libellant construed as an acquiescence. On arriving at Detroit, the home port of the tug and the residence of respondent, the boiler was found to need

The John Martin.

some slight repairs, and libellant, without consulting the owner, seized the occasion to make the alterations he had suggested, took apart certain portions of the engine, carried them to a foundry, and was superintending the work when he was discovered by the owner and discharged. The tug was delayed more than a day, and lost a valuable tow.

Mr. *H. B. Brown*, for libellant, contended that if the alteration was made in good faith, with the design of improving the engine, and libellant used reasonable skill, he ought not to be subjected to a forfeiture of his wages because he had failed to obtain the authority of the owner, citing 2 Hilliard on Torts, 473; Story on Bailments, secs. 429, 431, 433, 440.

Mr. *W. A. Moore*, for respondent.

WILKINS, J. I was satisfied at the close of the proofs that this libel ought to be dismissed, but the lucid argument of the proctor for libellant induced me to withhold a decree until further deliberation.

I believe fully the testimony of the respondent Pridgeon as to the rate at which libellant was employed as engineer of his tug, and also as to his loss incurred by libellant's unauthorized conduct in disabling the vessel by undertaking to remodel the engine at the home port, without the consent of the owner, who was personally present when the vessel reached the wharf. The engineer's conduct was unexcusable, and at the season and under the circumstances occasioned damage more than the amount of wages due.

In navigating a steamboat, the engineer commands and controls his own department, but this power cannot be extended beyond the voyage. When that terminates his power ceases, except so far as is *necessary* for repairing the engine and making ready for another voyage. He has no authority to remodel the engine without the consent of the owner. That consent was not obtained in this case, and the act of the engineer was one of gross insubordination—working a forfeiture of his wages.

Libel dismissed.

The Tan Bark Case.

THE TAN BARK CASE.

MAY, 1866.

RELEASE OF LIEN BY DELIVERY OF CARGO.—BILL OF LADING.—
LIABILITY OF CARRIER FOR LOSS BY FREEZING.

The delivery of a cargo to the consignee without demanding freight or notifying him of the master's lien therefor, will, in the absence of special agreement or local usage to the contrary, discharge such lien.

The mere intention of the master to retain his lien is not sufficient as against a consignee who has bought and paid for the cargo.

The bill of lading, though not conclusive, is very strong evidence of the apparent condition of the cargo.

A master who lays his vessel up for the winter, with cargo on board, is bound to take precautions to prevent injury from dampness or mold, and to protect his deck load from the effects of snow and ice.

When, by his negligence, the cargo is exposed to injury by an excepted peril, the carrier is liable. He is bound to take such precautions as he can foresee are necessary under the circumstances of the case.

LIBEL for freight. The libel averred that, in December, 1864, John Becker, as master of the schooner John Thursby, received on board of the schooner, at Goderich, 112½ cords of tan bark, to be carried to Detroit; that it was then very late in the season, and cold weather coming on suddenly, the schooner was frozen in and compelled to lie up at Goderich for the winter. That in the month of April following the schooner completed her voyage, and discharged her cargo at the dock of Jewell & Sons, at Detroit, with the understanding that they had bought the same, and would pay the freight thereon. That the bark was worth between \$500 and \$600; that their freight was to be \$3 50 per cord, and that, at the time of discharging the bark, libellants notified Jewell & Sons that they claimed a lien for freight, which they would not release without payment. That Jewell & Sons promised to pay the freight, did pay \$38 to apply upon it, but refused to pay the residue, or surrender possession of the bark.

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The ANSWER averred that the charter had been effected in October, and the bark sold in Detroit "to arrive" at \$9 50 per cord, but that, owing to the delay of the vessel, the sale had been rescinded, and claimant had made another bargain to sell to Jewell & Sons at \$6 per cord, if delivered in good order. That upon reaching Detroit it was found to be so badly injured by wet, dampness and mold, as to be nearly worthless, and that this damage had been occasioned by bad stowage and insufficient care. The agreement by Jewell & Sons to pay freight was denied, as well as notice of the master's lien for the same, and it was claimed that delivery of the cargo had discharged the lien.

Upon the trial it appeared that a bill of lading had been signed by the mate, certifying the bark to be "shipped in good order and condition." There was some conflict of testimony, however, as to its actual state at the time of shipment. The weather became so cold after the bark was laden on board that the vessel was unable to proceed on her voyage, and the master left her, with instructions to strip her of her sails and rigging, and lay her up for the winter. The hatches were fastened down, but not so tightly but that water dripped into the hold; the deck load had been put on board in the usual manner, but had not been roofed or otherwise protected from the weather, so that ice had gathered thick upon deck, and a portion of the bark had to be chopped out and thrown away. In being discharged, it was found the cargo was wet, molded, and damaged about one-half its value. There was a preponderance of evidence to the effect that the master had delivered the cargo to Jewell & Sons, who were assignees of the bill of lading, without notice of his lien for freight. While the bark was being unloaded, the master went to Cleveland upon other business, returned two days after the vessel had finished discharging, and demanded his freight, which was refused.

Mr. *W. A. Moore*, for libellant.

The delivery of the cargo was not made with the intention

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of releasing the lien (Angell on Carriers, § 370; *The Volunteer*, 1 Sum. 551; *Certain Logs of Mahogany*, 2 Sum. 589; *The Kimball*, 3 Wall. 37; *151 Tons of Coal*, 4 Blatch. C. C. 368).

The vessel is not responsible for the damage to the bark by freezing (*Clark v. Barnwell*, 12 How. 272; *Lamb v. Parkman*, 1 Sprague, 343; *Baxter v. Leland*, Abbott Adm. 348).

The bill of lading is not conclusive evidence of the condition of the cargo at the time of shipment (*Bissell v. Price*, 16 Ill. 408; *Ellis v. Willard*, 5 Seld. 529).

Mr. J. S. Newberry, for claimant.

WILKINS, J. I think it established by a preponderance of testimony that the master delivered the bark to Jewell & Sons without demanding freight or notifying them of his lien. It is true that \$38 was paid by them to Capt. Becker, while the cargo was being unloaded, but it was charged not to the master but to the shipper, Mr. Paul, and was allowed by him on his settlement with Jewell & Sons. The fact that the shipper was then in Detroit, and was present at the unloading of the vessel, taken in connection with the master's departure for Cleveland, and his failure to return until two days after the vessel had finished discharging, would naturally lead them to suppose he had waived his lien, and relied upon the personal responsibility of the shipper.

Prima facie, the delivery of the cargo to the consignee releases the lien for freight; it may be preserved, however, by a special agreement, by notice that the delivery is made subject to the lien, or by a local usage to that effect, but the mere intention of the master to retain his lien, not communicated to the consignee, is insufficient. (Angell on Carriers, §§ 370-374; *Bigelow v. Heaton*, 4 Den. 496; *Bags of Linseed*, 1 Black, 108).

As Jewell & Sons bought and paid for the bark before notice of the master's lien, it would be manifestly unjust to permit him now to enforce it.

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Independently of this, however, the claimant is entitled to recoup the damage suffered by the cargo. The evidence fails to satisfy me that it was not in good condition when shipped on board, notwithstanding the testimony of the master and mate that they told the shipper it was damaged and refused to receipt for it in good order. As matter of fact the mate did certify that it had been "shipped in good order and condition, and although a bill of lading may be contradicted in its recitals of number, quantity and quality, and is but slight evidence of the condition of goods packed in boxes or otherwise not open to inspection, it is very strong evidence of the outward condition of the cargo at the time of shipment.

In one case at least (*Benjamin v. Sinclair*, 1 Bailey, 174), it has been held conclusive evidence, though I cannot see that the doctrine of estoppel has any application to the case. It would be a premium, however, upon gross negligence to permit it to be controlled, except by clear evidence. In this case not only does the consignor testify that the bark was in good order when shipped, but it is admitted that the top layers of the deck load, which would naturally have come from the bottom of the pile as it lay upon the bank, and consequently most exposed to moisture, were in perfectly good condition when delivered.

Although a loss by freezing is an excepted peril, the carrier must be free from negligence. It was a contingency which, in this case, must have been foreseen, and should have been provided against. There is no evidence, however, that any precautions were taken to preserve the cargo from the effects of frost. Immediately upon the harbor being closed, the master left for home, leaving the vessel in charge of two men, with instructions to strip her and lay her up for the winter. He put no shipkeeper on board, but, as he says, paid a man \$5 "to keep an eye on her" during the winter. There is no evidence of what was done after his departure. No precautions, however, appear to have been taken to ventilate the hold, or to prevent dampness from collecting and injuring the bark. Where a cargo gathers moisture, as sometimes occurs

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in passing from a warm to a cold climate, it has been held the carrier is not responsible; but where the gathering of dampness and mold is the usual effect of laying a vessel up for several months, I think the master is bound to use some precautions by ventilating his hold, or otherwise to obviate injury. At least he should have exercised the ordinary prudence of roofing over his deck load, and preventing the ice from gathering upon the deck.

Where the negligence of the carrier exposes the goods to injury by an excepted peril, the authorities are uniform that he must respond in damages. He is bound to take not merely the usual precautions against frost, but all such as he could foresee were necessary to be taken under all the circumstances of the case (Edwards on Bailments, 456-478; Angell on Carriers, secs. 160-164; Abbott on Shipping, p. 485; *Semler v. Commissioners*, 1 Hilton, 244; *Bowman v. Teall*, 23 Wend. 306; *Clark v. Barnwell*, 12 How. 272; *N. J. Nav. Co. v. Merchants' Bank*, 6 How. 385).

As the damage to the cargo in this case exceeds the freight, the libellant is not entitled to recover.

Libel dismissed.

NOTE.—Upon the question of release of lien, see also the following cases: *The Eddy*, 5 Wall. 481; *The Bird of Paradise*, 5 Wall. 545; *Tamvaco v. Simpson*, Law Rep. 1 C. P. 368; *Paynter v. James*, Law Rep. 2 C. P. 348; *Kirchner v. Venus*, 12 Moore P. C. 361.

Henry Miller's Case.

HENRY MILLER'S CASE.

MARCH, 1867.

CRIMINAL JURISDICTION.—HIGH SEAS.

The great lakes are not "high seas" within the meaning of the Act of July 29, 1850, punishing the burning of vessels.

MOTION in arrest of judgment. The defendant was convicted of wilfully procuring the setting on fire of the passenger steamer Morning Star, plying between Detroit and Cleveland, on Lake Erie. The indictment was framed under the Act of July 29, 1850 (sec. 7, 9 Stat. 441), punishing the offense when committed on the "high seas." The defendant's counsel moved the Court that a rule be entered directing an arrest of judgment, for the reasons following, to wit:

1. Because the offense named in the indictment is charged to have been committed on the high seas, and this Court has no jurisdiction over any part of the high seas.

2. Because the offense charged in the indictment, if committed on any part of Lake Erie, is not an indictable offense within any Act of Congress cognizable by this Court.

3. It appears in evidence that if the offense charged in the indictment was committed at all, it was committed within the territorial boundaries of the State of Ohio, and hence the Court had no jurisdiction, and erred in refusing to charge the jury, as requested by the defendant's counsel, that this Court had no jurisdiction of the case.

Mr. *G. V. N. Lothrop*, for motion.

Mr. *Alfred Russell*, U. S. District Attorney, for the Government.

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WILKINS, J. By the Constitution Congress may define and punish felonies committed upon the high seas. The motion in this case requires the Court to determine the meaning of the words "high seas," as employed in the Constitution and the penal Acts passed thereunder.

The 7th section of the Act of July 29, 1850, under which this indictment is framed, provides that "every person not being an owner who shall on the *high seas* wilfully, with intent to destroy the same, set fire to any vessel," &c.

I regard it as settled that the high seas are the uninclosed waters of the ocean outside the projecting capes. Without going over the cases at length, I may refer to *Wiltberger's Case*, 5 Wheaton, 76, and *Bevans' Case*, 3 Wheaton, 336; *Grush's Case*, 5 Mason, 290. The Act of 1850, under consideration, is almost identical with the Act of March 26, 1804, chapter 40, and Judge Story, in *Robinson's Case*, 4 Mason, 307, gave a construction to that Act, and decided that ship-burning on a bay in the island of Bermuda, land-locked and inclosed by reefs, was not committed on the "high seas" within the purview of the Act. So Mr. Justice Nelson, in the late case of *Wilson*, 3 Blatch. 435, also held in respect to this offense when committed on the East river. It should be observed that in most other acts touching offenses on the high seas, the words "or in any haven, creek, basin, bay or other waters within the admiralty and maritime jurisdiction," are added. And within this latter description the lakes would be included.

But the Act of 1845 itself extending the admiralty jurisdiction over the lakes, recognizes the distinction between the lakes and the high seas. The same jurisdiction is given by that Act to the District Courts in certain cases arising on the lakes, as in cases arising on the high seas.

It is true that, in *Moore & Foot v. Am. Trans. Co.*, 24 How. 1, the Supreme Court declared that navigation upon Lake Erie was not inland navigation as contradistinguished from navigation upon the ocean, and used language classing the lakes with the ocean for certain commercial purposes; but

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the opinion in that case clearly points out the distinction between the lakes and the high seas.

I agree with the Court in Wilson's case, that it is within the constitutional competency of Congress to define and punish this offense when committed upon other waters than the high seas ; but Congress has not done so ; and in cases like this and the case of the Lake Erie pirate, Burley, the Federal Courts cannot act without an amendment of the Act of 1845 extending the jurisdiction to crimes, as well as to torts and contracts concerning lake shipping between the States. Such an act would be beneficial on account of the difficulty of fixing the locality of such crime so as to give jurisdiction to any particular State Court, and by reason of the accessibility and effective process of the Federal Courts. In this and other similar cases the offender will in all probability go unpunished in any State Court.

The evidence in this case exhibited a state of facts truly frightful to contemplate, and it is with great regret I feel compelled by the decisions of the Supreme Court to grant the motion and direct the discharge of the prisoner for want of jurisdiction.

Judgment arrested.

DISTRICT COURT.
NORTHERN DISTRICT OF OHIO.

HON. CHARLES T. SHERMAN,
DISTRICT JUDGE.

THE VOLUNTEER.

JANUARY, 1870.

JURISDICTION.—INLAND WATERS.

The admiralty has jurisdiction of a collision between a canal-boat and a tug engaged exclusively in harbor service and occurring upon navigable waters wholly within the body of a county.

THIS was a libel to recover damages to the canal-boat Fred. Wood, caused by a collision with the tugs Volunteer and Nichols, in the harbor of Cleveland, on the 7th of October, A. D. 1868.

Messrs. *Willey & Cary*, for libellant.

Messrs. *Canfield & Buckingham*, for claimant.

SHERMAN, J. The first question raised is, whether the Court has jurisdiction in admiralty of those vessels used only in the harbor of Cleveland and within the body of a county in Ohio. It is claimed the only jurisdiction, if any, this Court can exercise is by virtue of the Act of Congress of 1845, and that this Act does not confer general admiralty jurisdiction over vessels navigating these lakes, much less over vessels only

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plying, as these vessels do, within the body of the county of Cuyahoga.

This has been a much mooted question, and there has been much controversy on the subject, both in this country and elsewhere. It cannot be said that it is yet a well settled question either way. But so far as this district is concerned, it may be considered *res adjudicata*. In the Revenue Cutter Cases (*ante*, p. 76), it was, after an elaborate argument, and due examination and deliberation, decided by my predecessor, that, under the Constitution and laws of the United States, admiralty jurisdiction did extend over the lakes and their navigable waters. This decision has never been reversed, and the learned opinion then announced never been answered or much controverted. I shall, therefore, adhere to it as the law of this Court, until it is reversed or modified by the Supreme Court. The same may be said as to the admiralty jurisdiction over tugs and other vessels plying in the navigable waters and harbors of the lakes, and used in the commerce carried on between the States bordering on the lakes. It has been frequently decided that these vessels, though not actually employed in transporting freight and passengers to points and places outside of the State, yet they are links of transportation necessary and indispensable to enable the commerce between the States to be duly carried on; and, therefore, they are properly subject to admiralty jurisdiction. Both of these tugs were used in towing vessels engaged in commerce between the States, in the harbor, and outside to their destination. The canal-boat injured was actually employed at the time in bringing a cargo to a vessel destined to Chicago or Detroit. The tugs and the canal-boat were all, therefore, links of transportation, and come within the uniform rulings of the Courts bordering on the lakes.

Such being the law of the case, and being satisfied from the evidence that the tug Volunteer was in the fault, the decree will be against her alone, for such damages as may be found, upon reference, that the canal-boat sustained.

Libel dismissed as to the tug Nichols.

Decree for libellant.

The Bramen.

THE BRAMEN.

MARCH, 1871.

WAGES.—MORTGAGEE IN POSSESSION.

A mortgagee in possession is liable for the mate's wages.

THIS was an action brought to recover the wages of libellant as mate, and of his wife as cook, of the scow Bramen during the season of 1870. The action was *in personam* against Hurst, as the owner of the scow. Hurst denied the ownership and his liability.

It appeared from the evidence that the scow was built by one Gabriel, and two men by the name of Stywalt. That, during its construction, they became indebted to the respondent Hurst in a large sum of money, which they secured at first by a mortgage on the scow, and subsequently by an absolute bill of sale, accompanied, however, by a verbal agreement that, upon the payment of the money to Hurst, the vessel should be conveyed back. That, upon the execution of the bill of sale, Hurst took out a new enrollment in his own name, and by his consent Captain Rayman assumed charge and command of the vessel, with the understanding that he would account for her earnings to Hurst.

Messrs. *Willey, Cary and Terrell*, for libellant.

Messrs. *Mix, Noble and White*, for respondent.

SHERMAN, J. Upon the state of facts disclosed by the evidence I am satisfied that the bill of sale given by Stywalt and other owners was, and should be treated as a mortgage, and that Hurst held it only as mortgagee. The case turns upon the fact whether the vessel was or was not in his possession, and under his control. If he held it as a mortgagee

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without possession, the authorities, both in this country and in England, hold that he is not liable for the wages of the officers and crew, or for repairs and supplies. If he was a mortgagee with possession, then, under the English authorities, he would not be liable, unless the supplies were furnished and services performed upon his credit. But by the American authorities (see *Hodgson v. Butts*, 3 Cranch, 140; *Tucker v. Buffington*, 15 Mass. 477; *Miln v. Spinola*, 4 Hill, 177), he would be held and considered as the owner, and liable for the expenses and supplies. These authorities lay down the principle clearly and distinctly, and must govern this case.

I have carefully examined the evidence, and if, from it, I had any doubt that Hurst had not the possession and control of the vessel after he had received the bill of sale, that doubt would be resolved by the fact that he took out an enrollment of the vessel in his own name, and in doing so swore that he was the true owner, and in actual possession of the same. And thus being the owner, and the vessel running for his benefit, he must be held liable for the wages of the libellant and his wife.

Decree for libellant.

THE NEIL COCHRAN.

JANUARY, 1872.

JURISDICTION.—INJURY TO BRIDGE.

An action will not lie in admiralty against a vessel to recover for damage done by her to a bridge thrown over a navigable stream.

LIBEL for collision. The facts are fully stated in the opinion of the Court.

The Neil Cochran.

Mr. *James Mason* and Messrs. *Estep & Burke*, for libellant.

Messrs. *Willey, Cary & Terrell*, for claimant.

SHERMAN, J. This is a libel by the Lake Shore and Michigan Southern Railroad Company against the schooner Neil Cochran, setting up substantially the following facts :

The libellant is a corporation duly incorporated under the laws of the State of Ohio, having its office and principal place of business at Cleveland. It is the owner of an iron swing-bridge across the Cuyahoga river, near its mouth, being so constructed as to swing entirely out of the way of vessels navigating the river, enabling them to pass and repass without obstruction. Said bridge is duly authorized by law, and is kept constantly manned, night and day, with a sufficient force to swing it when vessels approach, and at night is lighted and in full view of all vessels entering said harbor.

On the night of November 10th, 1871, the bridge was so lighted, manned and ready to be swung, upon notice of the approach of vessels, by lights, signals or otherwise. The schooner Neil Cochran came into the port of Cleveland, on a voyage from Port Hope, in Canada. When the vessel approached and entered the Cuyahoga river, she was without lights, and gave no signal whatever. By reason of the darkness of the night she was not, and could not be, seen by those in charge of the bridge, until she was so near that the bridge could not be swung out of her way ; and the vessel negligently and carelessly ran into and against the bridge with great force and violence, and broke and injured the bridge to the extent of ten thousand dollars.

This damage was occasioned solely by the neglect of the vessel to exhibit lights and to give any signal of her approach.

The libel then prays process against the vessel, and that a decree be pronounced against her for said damage and costs.

To this libel William R. Stafford, owner and claimant of said vessel, files an exception alleging that said libel is insuffi-

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cient in this, to wit: "That the wrongful acts alleged in said libel against the said schooner Neil Cochran, her master and crew, do not constitute a marine or maritime tort; and that this Court has no jurisdiction of this case in manner and form as here brought."

The question, then, for the Court is this: Do the wrongful acts set forth in the libel constitute a marine or maritime tort? In the decision of this question it is unnecessary for the Court to go into a review of the authorities as to the jurisdiction of admiralty in cases of tort. It is sufficient to say that it is well settled and conceded law that the test of admiralty jurisdiction in cases of tort is the locality of the act. Therefore, in this and all other like cases, when we have determined whether the tort was committed upon navigable waters within the admiralty cognizance, we have also determined the question as to whether or not it is a marine or maritime tort.

In determining this question I shall be guided by the decision of the Supreme Court of the United States, the opinion delivered by Mr. Justice Nelson, in the case of *The Plymouth* (3 Wallace, 20).

From that case, supported by the clearest and most convincing reasoning, the following propositions are deducible:

First. The jurisdiction of the admiralty over marine torts depends upon locality—the high seas or other navigable waters within admiralty cognizance.

Second. The origin of the wrong must not only be on navigable water, but the substance and consummation of the injury must also be on navigable water.

Third. The fact that an injury is done by a vessel is of no weight in determining the question of jurisdiction, locality being the test.

Fourth. If the negligence which occasions the injury is upon navigable waters, but the whole damage resulting therefrom is upon the land, admiralty has no jurisdiction.

Fifth. The negligence, of itself, furnishes no cause of action; it is *damnum absque injuria*; the whole or substantial

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cause of action, both negligence and resulting damage, must be upon navigable water to constitute a maritime tort.

In the light of these propositions what shall be said of the case at bar? Clearly this: That the origin of the wrong was upon navigable water, but that the whole damage resulting therefrom was done upon the land, the bridge being attached to and a part of the land. Indeed, the case at bar and the case of *The Plymouth* are identical in principle. In that case, *The Falcon*, a steam propeller, was moored at the wharf in the Chicago river; she took fire through the negligence of those in charge of her; the fire communicated to and burned down some large packing houses on the wharf, and the owners of the packing houses filed a libel against the owners of *The Falcon*, for the resulting damage. The libel was dismissed for want of jurisdiction, and the United States Supreme Court affirmed the decree.

There, as here, the negligence or origin of the wrong was on board a vessel, an instrument of commerce; there, as here, the vessel was, at the time of the negligent acts, on navigable waters; and here, as there, the whole damage or consummation of the injury was upon the land. There is no distinction to be taken between the cases.

I conclude, then, in the case at bar, the substantial damage or injury, for which the libellant asks relief, was done upon the land, and not upon navigable waters; and that, therefore, this Court has no jurisdiction in the case.

Libel dismissed.

NOTE.—See *The Ottawa*, post.

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THE GLOVER.

OCTOBER, 1872.

DEMURRAGE.—CONSIGNEE.—CUSTOM.

Where no "lay days" are provided in the charter party or bill of lading, and there is no express stipulation as to the time of unloading, the consignee is not liable for delays occurring without his fault.

If it is a custom at the port of delivery for vessels to be unloaded through an elevator, each vessel waiting its turn, such custom becomes part of the contract, and the master takes upon himself the risks and delays incident to such a method of unloading.

THE libel in this case was filed *in personam* to compel the payment of demurrage by the consignee Thomas Walton, for seven days' detention of the schooner Glover, in unloading a cargo of barley in the port of Cleveland. The bill of lading was in the usual form, but did not provide for "lay" days, nor for compensation for detention. It was general in its form, such as is customary on the lakes. From the proof it appeared that the vessel arrived at 10 o'clock A. M., on Wednesday, October 4th, and was forthwith reported to Thomas Walton, the consignee. That upon inquiry, both by Walton and the captain, no elevator could be found in the port that would agree to unload her before the next Friday. That on Friday, the 6th, the vessel was at the Erie elevator and commenced unloading, but the cargo of barley was found to be wet, caused by leaking through the hatches, and they therefore ceased unloading; that by the next Tuesday the barley, by throwing open the hatches and by other means, became dry enough to commence unloading; that about one-half was unloaded, when some of the machinery of the elevator broke, and the barley was not entirely unloaded until Thursday. It was also established by the proof that it was a general and uniform custom along the lakes, including this port, that the consignee should have twenty-four hours, after the arrival of a vessel at the docks, to

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provide a place and prepare for its unloading; that all grain should be unloaded by means of an elevator, and that, in unloading at an elevator, every vessel should take its turn in the order of its arrival.

Under this state of facts the libellants, on the one hand, claimed to recover damages for the detention of the vessel, at the rate of \$75 per day, the agreed value, and, on the other hand, the respondent and consignee claimed that he was not liable for such detention, as it was not caused by his fault or neglect.

Messrs. *Willey, Cary & Terrell*, for libellant.

Messrs. *Prentiss & Vorce*, for respondent.

SHERMAN, J. The liability of the consignee in this action turns upon the question whether the law imposes upon him the payment of damage when the detention was not caused by his actual fault or neglect. Originally it was held that damage could only be recovered when it was expressly stipulated for in the contract of affreightment or bill of lading; but of late years it is established that it may also be recovered when there is a breach of an implied covenant or duty on the part of the consignee. In former times, all charter parties and bills of lading, stipulated on behalf of the freightors or consignees, that a certain number of days should be allowed for unloading, and that, after their expiration, an agreed price per day should be paid for demurrage. The Courts before whom such contracts came, uniformly held that the consignee was liable for such demurrage, no matter for what reason or whose fault caused the detention. They so held, because it was the contract of the parties, but chiefly because it was a contract mutually entered into, and the consignee could have provided for a large number of days, or could have stipulated against a liability for delay caused by means and occurrences over which he had no control (*Randall v. Lynoh*, 2 Camp. 352; s. c. 12 East, 179; 1 Parsons on Shipping, 314). In other

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cases, where, according to modern usage, there is no stipulation for "lay days" or demurrage in the charter party or bill of lading, the Courts uniformly, both in England and America, hold that where there is no express stipulation as to the time of unloading, a consignee is not liable for delays occurring without his fault, or a failure on his part to comply with some of the obligations imposed on him by law or a custom of the port as to unloading (*Burmester v. Hodson*, 2 Camp. 483, 488). Chief Justice Mansfield, in the last case, said: "Here the law could only raise an implied promise to discharge the ship in the usual and customary time for unloading such a cargo. That has been rightly held to be the time within which a vessel can be unloaded in her turn into the bonded warehouses." The same doctrine is fully sustained in *Abbott on Shipping* (311, 312, 313); also in *The Cargo of the Mary E. Taber* (1 Ben. 105); and *R. R. Co. v. Northam* (2 Ben. 1); *Towle v. Kettel* (5 Cush. 18). In the late case of *Strong v. A Quantity of Wheat*, in the United States District Court, Northern District of New York, in manuscript, Judge Hall held that a master of a vessel was bound to know the custom of the port to which he conveyed a load of grain, and if the custom prevailed at the port that all grain should be unloaded at an elevator, and that the vessel should wait its turn, that the custom entered into and became part of the contract, and that the master was bound by that custom.

This distinction between the liability of consignees, when "lay" days and demurrage are provided for in bills of lading, and their liability where they are not mentioned and provided for, is fully recognized in all the reported cases. It is not recognized in rather a popular elementary work, because of the well known carelessness and want of research by its reputed author, and hence has grown up an extended misapprehension of the law on this subject. Bearing in mind this distinction, and the fact that this bill of lading was a general one, with no provision for "lay" days or demurrage, the question arises: Did Walton, by his neglect or fault, cause detention of this vessel? The detention from Wednesday to Friday, in wait-

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ing its turn to get to the elevator, was, according to the above authorities, and especially that from Judge Hall, of the Northern District of New York, a part of the contract, was in compliance with the custom of the port, and Walton, the consignee, was not liable. On Friday, after the elevator commenced to take in the cargo, finding the barley was wet, its managers refused taking it in until it was dried. The libellant claimed that the elevator stopped taking it in because of the orders of Walton, who wanted to consult the insurance company. The captain of the vessel so swears. Walton swears the contrary, and states positively that the elevator people refused to take it because of its condition. The burden of the proof of the fact is on the libellant, but the testimony is balanced, and I must assume that Walton did not order as claimed. If so, then the detention of the vessel from Friday to the next Tuesday was not Walton's fault, but was rather the fault of the master of the vessel, who permitted his cargo to become wet by the defective state of his hatches. Nor was it Walton's fault that the vessel was further delayed until next Thursday in consequence of the breaking of the machinery of the elevator, while it was engaged in taking in the barley. The master was aware of the well known and uniform custom in all the ports on the lakes: that grain is only unloaded from a vessel by and through an elevator, and that such was contemplated when he made his contract, and therefore he takes upon himself all the risks and accidents incident to such a method of unloading.

I am of the opinion, therefore, that Walton, the consignee, is not liable in this action.

Libel dismissed.

NOTE.—It seems to be assumed in this case that an action *in personam* will lie in admiralty against the consignee to recover demurrage occasioned by his default, and such appears now to be the law.

It has been lately decided by Judge Lowell, of the Massachusetts District, that a suit *in rem* will lie against the cargo to recover damages for delay in unloading. (*The Hyperion's Cargo*, 7 Law Rev. 457. See also *Tapscott v. Belfour* 1 Asp. Mar. Law Cas. 501; *Ford v. Cotesworth*, 8 Mar. Law Cas. 468.)

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CIRCUIT COURT.
NORTHERN DISTRICT OF OHIO.

HON. HALMER H. EMMONS, CIRCUIT JUDGE.

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THE AVON.

FEBRUARY, 1873.

COLLISION IN THE WELLAND CANAL.—JURISDICTION OF TORTS IN
FOREIGN WATERS WHERE LOCAL LAW GIVES NO LIEN.—AD-
MIRALTY LIEN NOT DIVESTED BY SALE TO BONA FIDE PURCHASER,
UNLESS BY A PROCEEDING IN REM.—LIBELLANT'S DAMAGES NOT
TO BE DECREASED BY AMOUNT PAID HIM BY UNDERWRITERS.

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The general maritime law universally recognized by civilized nations gives a lien for a marine tort upon the offending vessel, and this lien travels with the ship into whosoever hands she may go. The proceeding *in rem*, to enforce such a lien, is not process. In no sense is it remedy only, or a part of the *lex fori*, but is the enforcement of a proprietary interest.

This lien or proprietary interest is not divested by a sale to a *bona fide* purchaser without notice, unless had by virtue of a judicial proceeding *in rem*. A transfer within a jurisdiction where the offending ship is not subject to seizure does not constitute an exception to this rule.

The waters of the Welland Canal, as now used for international commerce, are within American admiralty jurisdiction. The Suez and other canals, and all the improved navigation of the world, have been, and from the nature of their use should be, as much subject to admiralty jurisdiction as waters in natural channels.

While a natural thoroughfare, although wholly within the dominion of a government, may be passed by commercial ships *of right*, yet the nation which constructs an artificial channel may annex such conditions to its use as it pleases.

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When it may be inferred that the maritime law sought to be applied is excluded by the *lex loci*, the remedy *in rem* should be denied. If from the circumstances a contrary presumption arises, the principle of the maritime law involved should be enforced.

It is not enough *per se* to deprive a Court of admiralty jurisdiction, that collision happens where there is municipal *power* to exclude the maritime rule. It must further appear that it has actually been done, and this the record in this case fails to show. The mere absence of a tribunal to enforce the maritime law has never been admitted as sufficient evidence of intention to exclude it.

No argument can be drawn from the fact that the Welland Canal is a *tideless* water, and that therefore the authorities which sustain admiralty jurisdiction over torts and contracts, in foreign waters, do not extend the maritime law over it. Admiralty Courts have taken jurisdiction wholly irrespective of the fact of a tide.

Inapplicability of the *lex loci contractus*, the *lex rei citæ*, and the *lex loci delicti*, where obligations growing out of international commerce are to be adjudicated with reference to the maritime law, considered.

The libellant in a collision case, when successful, is entitled to recover the full amount of his damages, notwithstanding he may have received partial indemnity from the underwriters.

COLLISION in the Welland Canal between the schooner Medbury and the propeller Avon. The claimant interposed two special pleas to the libel. (1) That the Avon was a British vessel, owned and registered in Ontario, and at the time of the collision bound from one British port to another—that the Welland Canal is an artificial navigable water connecting Lakes Erie and Ontario, exclusively British property, and within British territory. (2) That after the collision and before libel filed, claimant purchased the propeller for a valuable consideration, without notice of this claim. That there are no admiralty courts in Ontario, and no admiralty jurisdiction in force there, and that by the laws of said province the propeller is not liable to seizure for injuries done by her while owned by another person.

Messrs. *B. R. Beavis and Willey, Cary & Terrell*, for libellants.

The only reported case upon the question whether Courts

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of admiralty have jurisdiction of a tort committed upon the Welland Canal is that of *Scott v. The Young America* (Newb. 101), where the jurisdiction was sustained. This has ever since been accepted as law. This decision was not based upon the obsolete Act of 1845, for it declared the Act of 1789 furnished a broader jurisdiction. The case of *The Genesee Chief* was rested "upon the ground that the lakes and *navigable waters* connecting them are within the scope of admiralty jurisdiction." Same language is employed in case of *The Eagle* (8 Wall. 20), which is decisive of the present case.

The objection that the Avon was *owned* in Canada is met by the uniform practice of the American Courts for sixty years to enforce remedies in admiralty without reference to ownership, whether domestic or foreign (*The Commerce*, 1 Black, 580; *The Maggie Hammond*, 9 Wall. 435). No case can be found holding that jurisdiction between *our own citizens* and foreigners is a matter of comity—it is everywhere treated as a matter of *right*.

The fact that by the local law there is no lien for a *tort* is disposed of by the case of *The Eagle*. It is not a question of local law, but of the general maritime law, though in cases of *contract*, the court may decline jurisdiction if it sees fit (1 Pars. on Ship. 531).

The District Court erred in deducting from the damages the amount received from the insurance companies. It is something with which a trespasser has nothing to do. If the insurance is paid before suit brought, and the company subrogated, the company is the proper party to sue, but if paid after suit brought, as in this case, the proceeding is not affected by it. The company may become a party as co-libellant if it chooses, or the suit may go on as commenced, the libellant accounting to the company for its proportion.

Messrs. *Estep & Burk*, for claimant.

(1) The jurisdiction in cases of tort depends exclusively on locality—it must happen upon waters over which the jurisdic-

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tion extends (*The Commerce*, 1 Black, 584). The "navigable waters" spoken of in the Acts of 1789 are known by different names, and it is, perhaps, not necessary they should be connected directly with the sea. The words "navigable streams" are sometimes used, but no correct definition could make this canal a *stream* of water, as it is without head or flow, and vessels pass through it with the aid of a dozen locks. No case can be found of a Court of Admiralty assuming jurisdiction of a collision in a canal except in the great Holland Canal, which was treated as a confining of the waters of the sea to a particular locality.

In the cases of the *Genesee Chief* and *Eagle*, the distinction is taken between *public navigable streams*, which are the common property of both nations, and *private ways* constructed by corporate enterprise, into which vessels can only enter by leave, upon payment of tolls, and subject to regulations prescribed by the owner or the Canadian Government. The canal in question was dry land more than fifty feet above the level of Lake Ontario when Congress passed the Act of 1789, and so continued for more than fifty years. Congress could not therefore have intended to include it.

The Ohio and Pennsylvania Canal connects the navigable waters of two States, and is navigable by vessels of 100 tons, but it has never been claimed to be within the jurisdiction of Admiralty. They are navigable, but not public navigable streams. These canals may be, and frequently are, leased to private corporations or individuals, who may close them against everybody but themselves.

In the case of *The Young America*, no plea or answer was interposed, and the case was heard on motion to set aside the decree. The decision was based wholly upon the Act of 1845, now obsolete, the canal being in full operation when Congress passed the act, and they must have intended to include it.

(2) The seizure of the vessel is a proceeding *in rem*, based upon a maritime lien for the injury complained of, which is enforced by subjecting the property to the satisfaction of the claim. If such lien exists it must be by virtue of some law.

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Evidence shows it is not by the law of Canada—it cannot be by virtue of a law of the United States, as they have no extra-territorial jurisdiction. This Court can only enforce liens given by some law—it cannot create them. There was no lien while the propeller remained in Canada; yet if it did not then exist it did not attach when she came into American waters. It is not claimed the lien was created by the seizure, for the seizure was made to enforce a lien already existing. The property could not be seized upon execution or attachment, as it had passed out of the hands of the person doing the injury. By the law under which the present owners acquired title, she was free and unincumbered, and ought to remain so wherever she goes. The contract under which they bought the property is governed by the *lex loci contractus*, and if valid there, it should be held by the comity of nations valid everywhere.

EMMONS, J. The Avon is a Canadian vessel. On her way from a Canadian port on Lake Ontario, to another like port on Lake Erie, she collided in the Welland Canal with the libellant's vessel, an American ship, on its way from one American port to another. The canal connects the two lakes, and is wholly artificial, but by treaty between England and the United States, and local Canadian laws, is open alike to the ships of both countries. It is a thoroughfare for international commerce, and is navigated by ships as well from the ocean as the lakes. Subsequent to the collision, and before the filing of the libel, the Avon was sold in Canada to a Canadian purchaser. This suit was commenced the first time she visited an American port, and no laches are imputed to the libellant.

We have given the case far more than its share of attention, and are at last compelled to make a decree condemning the Avon, in much doubt, however apparently logical the steps may seem by which it has been reached.

It is argued by the claimant that there is no jurisdiction for wrongs occurring in this artificial passage, created by and wholly within the government of Canada. That as the local

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law of that province gives no lien, none can be enforced here, and that, at all events, the subsequent sale from one subject to another of a Canadian ship within that province, as it there gave an unincumbered title, all other Courts will respect and protect it. These propositions are deemed too well settled to require citations in their support.

We have an argumentative purpose in noticing a few familiar maxims, which respondent's counsel deem conclusive objections to the relief asked. Numerous judgments and authors too, when attention is not challenged to the distinction, dispose of cases like that before this Court, as if the rules we shall fully concede were applicable to their determination. This libel sets up a wrong, where consequences are not to be measured by the local law, and that it may be clearly perceived that this case constitutes an exception to the principles which generally apply to such local code, we desire to state and concede them, with their proper qualifications, in some fullness and detail.

The utmost extension of the rules in reference to the *lex loci contractus*, as sustained in the following treatises and judgments, and the numerous other similar ones, both Federal and State, are not intended to be in any degree disregarded or even qualified. (Story Conf. of Laws, §§ 242, 243, and 327; Whart. Int. Law, tit. *Lex rei citæ* and *Lex loci contractus*; *Bell v. Bruen*, 1 How. 169; *Duncan v. U. S.* 7 Pet. 435; *Caldwell v. Carrington*, 9 Pet. 86; *Pope v. Nickerson*, 3 Story, 465; *Bank of Augusta v. Earle*, 13 Pet. 520; *Allen v. Sheuchart*, 10 Am. Law Reg. 13; *Mut. Ins. Co. v. Wright*, 23 How. 412; *Bulkley v. Honold*, 19 How. 390; Wheaton Int. Law, pt. 11, chap. 2, § 7.)

The ship being Canadian, and at the time of the sale in Canadian waters, and the parties Canadians, bring the case so clearly within the principles which apply the *lex rei citæ*, that any analysis of judgments is unnecessary to show that the local law will regulate rights unless the *maritime* is made to apply. Whart. Priv. Int. Law, tit. *Lex rei citæ*, discusses with special fullness this subject, and so far as the facts of *this*

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case are concerned, his criticism is approved. It is familiar law in the Federal Courts.

The municipal *lex loci delicti* will equally control, if the conditions of this navigation are not such as to make applicable the principles governing collisions upon the sea. (See Story Conflict Laws, §§ 423 b, 423 g; Whart. Priv. Int. Law, §§ 477, 480, and notes do., § 707; *Whitford v. Panama R. R. Co.* 23 N. Y. 467, 475, 482; *Rafael v. Verelst*, 2 Wm. Bl. 1055; *Martyn v. Fabrigas*, Cowp. 161, and notes in Smith's Leading Cases; *The Halley*, Law Rep. 2 Adm. 17, 18, 19, 22.) This well understood rule is of course not intentionally interfered with. That an act lawful by the law of the place where it takes place is so everywhere, is but a truism. That no Court can create a lien by its judgment upon property without its territorial jurisdiction, or assume to administer its own municipal law to create one, over things not subject to its provisions, when and where the transactions occurred, out of which it is asserted the right *in rem* springs, is also in its broadest sense admitted. (Whart. Priv. Int. Law, § 828; Story's Conflict of Laws, §§ 322 b, 401, 402 a.) Not only do we decide as we do in the light of such a rule, but say with confidence, we should dissent from the qualifications asserted by Courts of great respectability. We should have decided differently *The Milford* (Swabey, 362), *The Jonathan Goodhue* (do. 526), in which, by virtue of an *English statute*, Dr. Lushington gave an American master a lien not authorized by the law of his own country, and in reference to which his contract was made. They are justly criticised in *The Halley* (Law Rep. 2 Ad. 12). This proceeding *in rem* is not process. In no sense is it *remedy* only, or a part of the *lex fori*. It is the enforcement of a proprietary interest, and can no more be resorted to when *that* by the law of the place of the contract or of the act does not exist, than a suit for possession can be maintained without a title to support it. Although there are some judgments in the Supreme Court which seem so to treat it, and the history of the 12th admiralty rule would authorize a different doctrine, the late tendencies there, and its numer-

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ous other decisions, ably drawing the line between the laws of contracts and of property, and mere remedies, show clearly there is no authority in that high tribunal for sustaining this libel upon the notion that the proceeding is but a remedial form. In *Vandewater v. Mills* (19 How. 82), the Court, by Grier, J., comments upon the looseness of likening it to attachments *in personam*. The late case of *Harmer v. Bebl* (22 Law & Eq. 62; s. c. 7 Moore P. C. 267), which is often approved in the Supreme Court, in discussing the nature of this proceeding, points out clearly the broad difference between process and remedies, on the one hand, and the enforcement specifically of an interest in the thing on the other. Unless therefore a *lien*, by virtue of some law applicable to the act, was created by this collision, when and where it occurred, there is no standing here by the libellant. We sustain the libel only because it is believed the *maritime law* affords the measure of right.

That the general maritime law yields, in all instances, when it is the will of the local sovereignty that its own code shall apply in waters subject to its control, is but another undisputed maxim; and although no question has been made that this artificial passage, wholly within the dominion, *may* be fully governed by its laws, and all conditions annexed to its navigation which the political power deems expedient, we suggest, for the purpose of construing some judgments hereafter cited, that it is no more absolute and plenary than that of all governments in the natural bays, ports, and partially inclosed waters of the sea. (Wheat. Int. Law, part 2, chap. 2, § 9; Ben. Adm'lty, §§ 39, 256, 240; Whart. Priv. Int. Law, §§ 356, 358, 440, 443, 859; Halleck Int. Law, p. 130, § 13, citing Wheat. pt. 2, ch. 4, §.6, and other authors.) After saying that the local jurisdiction extends to all bays and ports within headlands, and to a marine league from shore, he adds: "Within this territory its rights of property and territorial jurisdiction are *absolute*, and exclude that of every other nation." (See p. 132, § 16.) More than this certainly cannot be said of

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the Welland Canal. Judgments in reference to acts in such waters are precedents for like proceedings here.

We have a motive, too, in calling attention to the rule that, when waters are boundaries, like the St. Clair and Detroit rivers, where the collision in the case of *Eagle* (8 Wall. 15) occurred, the *right*, the *absolute right*, of navigation is common to the ships of both countries, and also that, when rivers or narrow straits of the sea lead through one country into another, there also the right of passage exists, and the municipal jurisdiction is modified accordingly. (Halleck, 137, § 22; Wheat. pt. 2, ch. 4, § 11; 1 Phill. § 155; Halleck, pp. 138, 140, 141, 142, 146; Wheat., *ante*, §§ 12 and 14.)

It is no longer questioned here or in England, that for a marine tort a lien exists upon the offending ship. In the *Rock Island Bridge* (6 Wall. 213), it is said: "For torts committed upon the sea, a lien is given which travels with the ship into whosoever hands she may go." *The Bold Buccleugh* (7 Moore P. C. 284) is approved. That it is universally recognized as a part of the general *maritime* law, and dependent upon no local rule of the English or American admiralty, see the *America* (6 Law Rep. N. S. 264); where, in a careful opinion, Judge Hall, of the Northern District of New York, cites and reviews *Edwards v. The Stockton* (Crabbe, 580); *The Hornet* (*Ib.* 426; 16 Law Reg. 1); *The Nestor* (1 Sum. 78). They fully sustain his conclusions. And see *The R. B. Forbes* (Sprague, 328; s. o. 1 Cliff. 331; *Vandewater v. Mills* (19 How. 82); *The Young Mechanic* (2 Curtis, 404); *The Phæbe* (1 Ware, 263); *The Rebecca* (*Ib.* 188); *The Feronia* (L. R. 2 Ad. & Ec. 65); *The Commerce* (1 Black, 580).

This feature of *universality of recognition*, it will be seen, is an important element in the other question, whether it shall be applied within local jurisdiction by the presumed consent of the sovereign.

That the lien is not divested by sale to a *bona fide* purchaser, unless it is by virtue of a proceeding *in rem*, is also said in *Vandewater v. Mills* (19 How. 82), and *The Rock Island Bridge* (6 Wall. 213). The case cited and approved

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there is a strong instance of the application of the rule; cases, therefore, will be referred to, not in support of the general doctrine, but to show only that the circumstances of the present transfer, within a jurisdiction where the ship was not subject to seizure, do not constitute an exception.

The Rebecca (1 Ware, 188), *The Stockton* (Crabbe, 580), *The Mary* (1 Paine, 180), as well as several of the judgments before referred to as sustaining the general doctrine that the lien exists, presented circumstances of strong equities in favor of innocent purchasers who urged them against the enforcement of the lien. But it was held to constitute a proprietary interest which no transfer, save by a judicial proceeding *in rem*, could divest. *The Charles Amelia* (Law Rep. 2 Ad. & Ec. 330) was a collision in British waters between a French and English vessel. The former was subsequently sold under bankruptcy proceedings in France. It was said, as this was not a proceeding *in rem*, but one which sold the owner's interest only, the lien was not affected. (*The Bengal*, Swabey, 468; *The John and Mary*, Swabey, 471.) The one was a suit for seamen's wages, and the other for damages by collision. *Judgments at law* had been in both obtained, but this *election* was held not to preclude a subsequent resort to the offending ships. They, it was said, were primarily liable irrespective of ownership. In the *Batavia* (2 Dodson, 500), it was held that a sale in Batavia did not divest the lien for seamen's wages due in England.

Nor is this rule, in its most extended application, deemed an impolitic or hard one, the modification or restriction of which is demanded by the exigencies of modern commerce. It is favored, not because it is an ancient theory and old writers so say, but because the necessities of international intercourse and the safety of navigation have been found to require it. (*The China*, 7 Wall. 53; *The Halley*, Law Rep. 2 Ad. & Ec. 13 and 15; *The Prins Frederik*, 2 Dodson, 467; *The Rebecca*, Ware, 188.) Where there had been a sale without notice, it is said: "What can be more equitable, when the ship has been the cause of the damage, than to look to it for

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reparation? It is often the sole source of security." *The Gazelle* (2 W. Rob. 280), *The Amelia* (Brow. & Lush. 152), and nearly all the decisions hereafter cited, are equally commendatory of the rule which holds the ship liable as the offending thing, irrespective of transfers, with notice or without it. Conditions will be demanded more clearly indicative of an intent on the part of the local government to exclude *such* a rule, than would be required to displace one deemed hard and unconscionable, and at war with public policy. That the waters of the Welland Canal, as now used for international commerce, are within the American admiralty jurisdiction, we had, as remarked on the argument, no doubt, and had this collision occurred between two American ships, and no transfer had been made within the Dominion of Canada, we should have followed for other reasons than those there stated. *The Young America* (Newb. Adm'y Rep. 101); *The Genesee Chief* (12 How. 443); *The Magnolia* (20 How. 296); *The Commerce* (1 Black, 580); *The Hine v. Trevor* (4 Wall. 558); *The Belfast* (7 Wall. 624); *The Eagle* (8 Wall. 15); *The Daniel Ball* (10 Wall. 557), and kindred cases, include these waters. The recent English decisions, either drawing upon the late statutes, or treating their old phrase "Within the ebb and flow of the tide," as in reason only it should be treated, as a mode of describing navigability, have taken jurisdiction of cases in artificial and tideless waters. (See *The Eagle*, 8 Wall. 15, and the cases there and hereafter cited.)

There are few harbors in the Northwest which are not entered through wholly artificial passages. It would be most impolitic to say that a ship, in passing through our St. Mary's Canal, between Lakes Huron and Superior, is beyond the process of the admiralty. A large portion of the commerce of the latter lake will soon pass through the Portage Lake Canal. The St. Clair Flats are now so crossed by a similar channel, through which passes as much international commerce as through any waters on the continent. The Suez Canal, those of Venice, Amsterdam, Rotterdam, and the Great Northern Canal and basins of Holland, and all the improved navigations of the world have been, and from the nature of their use

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should be, as much subject to the admiralty jurisdiction as waters in natural channels. It would be a most mischievous and gratuitous distinction which would exclude them. There is but one difference which would work a material consequence in a case like that before us. A natural thoroughfare from sea to sea, although wholly within the domain of a government, may be passed by commercial ships *of right*, while the nation which constructs an artificial one may annex such conditions to its use as it pleases. Such a thoroughfare is subject to the same control as are the natural bays, whose waters are within natural headlands, and lead only to the country of the government controlling them. We cannot say, therefore, in this case, as we do of the collision in that of *The Eagle*, or as we would of a ship passing through the Bosphorus to a Russian port on the Black Sea, that Canada or Turkey could not impose their laws. We must treat it as we would a passage up the Golden Horn at Constantinople, or down the lagoon and up the Grand Canal at Venice, where every condition the local authority saw fit to impose would be obligatory. We must apply here the same implications which Admiralty Courts have established as general principles of law where the local authority is absolute and unqualified. If the result is an inference that the principle of the maritime law, now sought to be enforced, is excluded by that of Canada, the remedy *in rem* should be denied. If, on the contrary, precedent, and more especially wholesome protective principles, authorize a different presumption, the Avon should be held liable *in rem* for her offenses.

The claimant relies upon *Smith v. Condry* (1 How. 28) and the principles before recognized, that the obligation imposed upon an act in the State where it occurs should constitute the measure of liability in all other jurisdictions. That case exempted a ship from liability where an English statute compelled the employment of a pilot in the port of Liverpool, and expressly provided that the vessel should not be liable for damages resulting from the wrongs of such public officers. This judgment has been followed in *The Halley* (Law Rep. 2

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Adm. & Ec. 3). This latter case, by the general course of its learned and greatly extended argument, more than by any direct assertion of such a doctrine, shows that when the local law is applied, it is because the peculiar circumstances of the transaction and the nature of the law create the presumption that such is the intention of the sovereignty within whose waters the transaction occurred. It is not enough *per se* that a collision happens where there is municipal *power* to exclude the maritime rule. It must further appear that it has actually done so. When ships are seeking a port for protection or trade, or leaving it having engaged in it, and more especially where they are in the custody of its local political officers by compulsion, they are subject to such portions of the municipal law as are *intended* for their governance. The port police regulations, the local customs in reference to navigation, and all rules which, from their nature and office, are presumed to apply to domestic and stranger ships alike, regulate the conduct of both classes. If the power which prescribes them has declared the obligations which arise from their observance or violation, all other nations will adopt the same measure of duty. This is the limit of the rule.

Smith v. Condry, and similar judgments, may mislead, unless read in the light of general principles, which they do not intend to deny, and which some of them directly affirm. Literally and formally they assert the application of the *lex loci delicti*, as if it were a case upon land, and as if the general municipal law would, of its own force, and by its general promulgation in the State, apply to a marine tort as it would to a trespass within its real territory. This is by no means true. The inquiry is but half answered when we learn what is the local code regulating wrongs generally in the nation. The other, and equally important portion here is, has the Government, in unmistakable terms, declared that it shall be enforced upon foreign ships to the exclusion of the maritime rule? This is what we think is meant in the *Eagle*, where Justice Nelson says, that *Smith v. Condry* was an *exceptional case*. In the *Halley*, in all respects like *Smith v. Condry*, Sir R. Phill-

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more, p. 6, cites *The Girolamo* (3 Hagg. Adm. 177); *The Zolverein* (Swabey, 99); *The Golubchick* (1 Wm. Rob. 147); to which others might have been added, that the English Courts in cases of collisions administer the maritime law, and he follows them by cases showing the right *in rem* is a favorite in the admiralty. It is especially shown that it is quite consistent with the general rule for the Court of Admiralty to enforce all such modifications as the local government clearly creates.

The libellant's counsel considered the judgment in the *Eagle* as covering all the questions involved. Did it stand alone, we should not so hold. It did undoubtedly decide that the obligations created by a collision in Canadian waters were not measured by her laws in the circumstances of that case. Although it occurred where the municipal jurisdiction, for all the purposes of local government and of her own ships, was absolute, the Court said: "The cause would be governed by the practice and principles of the Courts of Admiralty of this country, wholly irrespective of any local law." They add that *Smith v. Condry* was an exceptional case, leaving the inference strong, as the libellants urge, that the generality asserted is universally applicable, save where ships have compulsorily submitted themselves to local governmental official control. But the facts in the *Eagle* required no such extended doctrine as is now imputed to it. The case leaves the law applicable to this record where it found it, imposing upon the Courts the duty of deciding whether, in the instance before it, the circumstances of the ship and the navigation subjected the transactions to the municipal or the maritime law. It was a very common case, so far as this point is concerned, and did not call for, as in the Superior Court it did not elicit, any judicial discussion. It occurred in boundary waters, the vessels were all Americans, exercising an *international right* in circumstances where, without exception, it has ever been held the local laws were inapplicable. It might as well be said that the English statutes limiting liability would control the obligation of an American owner for wrongs committed against a

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home vessel within a marine league of the island of Saint Helena. We do not therefore misunderstand the doctrine of the *Eagle*, and make it the foundation of our judgment, only so far as it reiterates the familiar doctrine we suppose it to announce.

We do not think the record shows, that Canada has excluded this favorite, universally recognized, and necessary principle of maritime law from the waters of this canal. She has opened this thoroughfare from sea to sea, as our Government has that over the St. Clair flats, and the hundreds of artificial entrances it has constructed to the harbors of the nation; as Holland has the Great Northern Canal and her other numerous artificial and improved navigations, and as the expensively constructed entrances to ports everywhere are opened. All alike are free to the commerce of the world. In all, the more general and universally acquiesced-in doctrines of the maritime law have been unreservedly applied, save where statutory limitations or local usages have modified it. The mere absence of a tribunal to enforce it has never been admitted as sufficient evidence of such an intention. We know of nothing in the conditions of this navigation which exempts it from the rules applied to all other waters where the municipal authority is equally supreme.

The following cases are those which, in the brief time we could command, have been selected from the long list in reference to the general subject most pertinent to the precise facts before us. We think they not only authorize, but compel, a subordinate Court to enforce the right asserted in the libel:

The Maggie Hammond (9 Wall. 435). The bill of lading was made in Scotland, by the master of a *Canadian* ship, to transport goods of a *Canadian* to *Canada*. Parties, contracts, goods, ship, and voyage, were all foreign. The vessel put into Wales, and there wrongfully refused to carry forward the cargo. The libel, in the opinion of the Court, set out two causes of action: the breach of the *contract to deliver*, and the wrongful act in Wales.

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In reference to the contract to deliver, and irrespective of the local wrong in Wales, jurisdiction *in rem* was sustained upon two grounds: First, that a lien existed by the general maritime law; and, second, that, although doubtful, the better opinion was that it did so by that of Scotland, where the contract was made. We are concerned with the first reason only. As to this, it is said, where a lien is given by the maritime law, it is no objection to proceeding in our Courts *in rem*, that the *local Courts were not clothed with similar authority*. Though as a general rule, where both litigants are subjects of the country where the transaction occurs, and where no such remedy exists, our Courts will refuse it as between them; still, if no objection by the consul is made, even in such case, they may in their discretion entertain jurisdiction. The decision seems full, that where the maritime law is clear, the mere absence of a local Court to enforce its liens will not prevent an American Court of Admiralty from doing so. The case before us is far clearer than the extreme one in the 9 Wall. Here the injured party is a citizen, and the offending ship the only source of satisfaction within our jurisdiction. This case applies the rule to a leading maritime State, and shows the practice is not by the Superior Court considered to depend upon the barbarous or semi-barbarous character of the countries in which actions have accrued. It treats the waters of England, Scotland and Wales, as it would those of Turkey, China, or Egypt. The absence of a Court in the one, no more than in the other, prevents the administration of maritime rights attendant upon contracts or wrongs within their waters. If such a distinction is not made, the precedents and conclusive doctrines of all authors, the assumption of the law for all time, precludes discussion here. Suppose the collision happened in China, Africa, or in the harbors of semi-barbarous or wholly non-commercial people, with no Court of Admiralty, the objection that its absence would prevent a remedy would not seriously be heard.

The following decision affords a striking illustration of how wholly independent is the administration of maritime

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liens of the other and different question whether, at the place and at the time they vest, there is a *remedy* for their enforcement :

The Siren (7 Wall. 152), a prize vessel in the custody of the captors, collided with the intervenor's ship. She was condemned and the proceeds paid into the registry. Although no suit *in rem* or otherwise could have been sustained, because the ship was the property of the Government, still it was said the lien existed and would be enforced whenever exigencies occurred which vested the jurisdiction of the Court. The practice in the English Admiralty against Government ships is referred to ; instances where seamen's wages have been enforced in cases of forfeiture to Government, and various other cases where liens and rights have been sustained after the subject has come into the possession of the Court, although they could not have been originally enforced, are discussed and likened to that in judgment. Page 158 it is said : " The existence of a lien is not dependent upon the ability of the claimant to enforce it." This in various forms of expression is repeated and illustrated.

The Davis (10 Wall. 15), is another instance of the enforcement of a maritime lien where the right to proceed *in rem* was dependent upon the future accidents of the *res*. The libellants proceeded as salvors of cotton owned by the United States, and although it was conceded no such remedy could be maintained if the property had reached the hands of Government officers, that the *lien* nevertheless attached, and it would be enforced if the process did not involve an invasion of their actual possession. *The Siren*, upon the point for which we cite it, is approved. The claimant's counsel then is hardly justified in saying that the *existence* of a lien without the ability to enforce it at the time it originally vests, and at the place and against the *thing* in its then condition, is an absurdity. We perceive neither absurdity, injustice or impolicy in saying that a right *in rem* exists, the enforcement of which may depend upon the accident of whether the *res* enters a jurisdiction where Courts are clothed with the necessary power, or

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passes from the hands of those in whose actual possession for political reasons it cannot be impleaded. And see *The Bird of Paradise* (5 Wall. 545).

The Ticonderoga (Swabey, 215), an American ship, was in the employ of the French Government, and by orders of an official, was taken in tow of a steamer, also in same employment, and through the sole fault of the latter was brought into collision with the *Melampus* in the Golden Horn at Constantinople; no question of jurisdiction was made or the peculiar character of the waters mentioned in the report of the case. This narrow bayou, but two or three miles in length, is in some places less than 700 feet wide, and is crossed by a bridge of boats connecting the city of Constantinople with its northern suburbs, Pera and Galata. It is not a thoroughfare from sea to sea, and the local municipal jurisdiction is as absolute as that of England in the Welland Canal. In the subsequent case of *The Griefswald* (Swabey, 430), in which the collision happened in the roadstead off the town of Dardanelles, a question of jurisdiction was made; but Dr. Lushington said he had no doubt of it, and it was said that in *The Ticonderoga*, the Court took "jurisdiction in these very waters." The case, however, proves far more than that admiralty jurisdiction will be assumed over these foreign waters bordered by cities and suburban towns, and inclosed from the sea by drawbridges and land thoroughfares. It holds that for a wrong *there committed* the general maritime law applies and will be enforced by a proceeding *in rem*. It being urged that the owners, and therefore the ship, were not liable, on account of the control of the French Government, Dr. Lushington replied: "We must recollect that this is a proceeding *in rem*. I am not aware where there has been a proceeding *in rem*, and the vessel has been guilty of damage, that any attempt has been made in this Court to deprive the party complaining of the right he has by the *maritime law of the world* of proceeding against the property itself." This is said in reference to a collision happening in private waters within the municipal jurisdiction of a country whose Courts at that time would not enforce the

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lien. The anomalous mixed foreign tribunals which by treaties and usage administer justice between citizens of *different nationalities* enforce *only* that *law of the world* to which Dr. Lushington refers. They administer the maritime law, because by the law of nations, where it is not by positive local law superseded, it applies within the municipal jurisdiction of Turkey. And this is just the proposition before us, and upon which this case depends. (See Wheat. Int. Law, pt. 1, chap. 1, § 10, and note by Lawrence; and same, pt. 2, chap. 2, § 12, and notes, for the character of these tribunals; and *The Griefswald*, Swabey, 430.) If the above case rightly applied the law, by giving an English owner a remedy *in rem* against an American citizen for a collision happening within a municipality where the *local law gave none*, it will require some nice distinctions which it is not the modern policy of admiralty tribunals, and certainly not of those of England or America to make, in order to distinguish the case at bar from it.

The Griefswald (Swabey, 430). The collision was in the roadstead off the town of Dardanelles, and within the municipal jurisdiction of Turkey. The *Griefswald* was Prussian, and the *Constellation* English. Two questions were decided: 1st. That the admiralty had jurisdiction of matters happening in waters within the municipal government of Turkey; and 2d. That the particular proceedings in the local Prussian Consular Court at Constantinople were not *res adjudicata*. In deciding the *last* and principal matter considered, Dr. Lushington says: "*The municipal laws of Prussia could have nothing to do with the question in issue, which must be governed by maritime law as it prevails in the maritime States of Europe.*" "In cases of collision, it has been the practice of this country, and so far as I know, of the European States, and of the United States of America, to allow a party alleging grievance by collision, to proceed *in rem* against the ship, *wherever found*, and this practice, it is manifest, is most conducive to justice, because in very many cases a remedy *in personam* would be impracticable." This reason for the rule would be

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readily defeated if a transfer terminated the liability of the offending *res*.

The *Mali Ivo* (Law Rep. 2 Adm. &c. 356) collision, in the Bosphorus, within the municipal jurisdiction of Turkey, between Norwegian and Austrian ships, Dr. Lushington said, he *doubted* whether there was, in such case, where *both* were foreigners, a discretion which would authorize him to decline the jurisdiction similar to that which existed in the case of seaman's wages. At all events there was no doubt as to the jurisdiction wherever the *tide ebbed*. The lien was enforced and the merits decided.

It is a singular use of this phrase, *ebb and flow of the tide*, in view of the well-known fact that there is no tide in the Black Sea, the Sea of Marmora, or the passage between them. (See Lippincott's Gazetteer, Black Sea; McCulloch's, same title; both assert there are no tides. Benedict's Adm. § 226, and the learned authors he refers to say the same thing.) This is noticed only to suggest that no argument can be drawn from the fact that the Welland Canal is a *tideless* water, and that therefore these English judgments do not extend the maritime law over it. They have paid no attention to this fact of a tide in foreign waters, but have taken jurisdiction wholly irrespective of it. Why they still cling to the meaningless form of words must depend upon reasons we do not appreciate.

In *The Bold Buccleugh* (3 Wm. Rob. 220; s. c. 2 Eng. L. & Eq. 536), the collision occurred in British waters, and the lien there attached, but she went to Scotland, was there seized, and *discharged on bail*, and by her law was not subject to second seizure. While in this condition she was sold to a *bona fide* purchaser in Scotland. The claim was as here, that as by the law of the place of sale, the *ship* was exempt from seizure, so she should be in England. Dr. Lushington thought the interests of commerce demanded a different rule, and saying that the *vendee* would have a remedy over against the *vendor*, notwithstanding the local law, he condemned the *Buccleugh*. This case is a leading one, and has several times been

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approved in the Supreme Court. It was affirmed 22 Eng. Law & Eq. and 7 Moore P. C. 267, upon the ground that the proceedings in Scotland were *in personam* only. But the principle for which it is quoted from 3 Wm. Rob. is in no way impaired.

It may well be that we, in this instance, may make a mistake in the opposite direction, but nothing is more common, even by Courts of high character, where attention is not challenged to the subject, than to overlook the inapplicability of the familiar rules in reference to the *lex loci contractus*, the *lex rei sitæ*, and the *lex loci delicti*, where obligations growing out of international commerce are to be adjudicated in reference to the maritime law. A bill of lading made in England, by the master of an American ship, will be governed by the American law, though the voyage be to France or to China. The *lex loci contractus* does not apply, although the contract is made in England. See *Pope v. Nickerson* (3 Story, 465); *Lloyd v. Guibert* (Law Rep. 1 Q. B. 115), the facts of which are too extended for statement, but in which is a most instructive opinion, discussing the application of the Danish law as that of the place of the principal contract; that of Portugal, where a bottomry bond in question was executed; that of England, being the place of delivery of the goods, the general maritime law, and lastly the French law, being that which was actually applied, to limit the liability of the owner, because it was *that of the ship*. It interestingly illustrates the impossibility and impolicy of applying, in these instances, the *lex loci*. The difficulty arising in semi-barbarous countries, and other places having little or no home commerce, and consequently little well-settled commercial law, while numerous foreign vessels of all other countries throng their ports, is forcibly stated.

The most influential portion of this elaborate judgment here, is that which concedes that if there had been any generally acknowledged maritime law, as universal and well-settled as that which we are asked to apply, and which prohibited the release of the owner upon resigning the ship and freight, so as to make the French law marked and exceptional, it would

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have been applied, and that of France rejected. The presumption was that the maritime law did apply where that was clear and undisputed.

In *Cammell v. Sewell* (5 Hurl. & Norman, 728), goods shipped in Russia by a Prussian ship, belonging to an English owner, were sold in Norway by the master, where the ship was wrecked. The sale was upheld, because the law of Norway authorized it. But each justice concedes that if there had been a well-settled maritime rule the other way, the local law should not have been applied. Crampton, J., says: "If it could be made out that there was a general maritime law on this subject, it would be a question how far we could suffer the law of a particular country to prevail against it." Cockburn, J., replying to this argument at the bar, said: "But the maritime law is not uniform," and repeats this as a reason in rendering judgment. Byles, J., believing such was the maritime law, was for holding the sale void. The goods here, it will be noticed, were not carried into Norway for the purpose of trade. It was one of the exigencies of international commerce, and it was for this reason that her laws should not govern, if they contravened the general maxims of commercial justice and policy.

In *Donald v. Hewitt* (33 Ala. 534), the court, in deciding that liens given by local statutes, to be enforced by judicial proceedings, would yield to a local home attachment *in personam* against the owner of the *res*, take pains to say such rules will not apply to maritime liens, which override the local law; and so are many other cases both here and in England. It is said in *Bags of Linseed* (1 Black, 108), Courts of Admiralty, in carrying into effect maritime contracts, are not governed by the rules of the common law, but deal with them upon equitable principles, and the usages and necessities of commerce.

In many other departments of international law, analogies may be found showing that the decree we make is more in accordance with its general spirit and policy than to hold that every ship, as it enters foreign waters, passed beyond its protection. At sea, the ship is part of the national territory to

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which it belongs. In ports, also, most nations still suffer the same theory to apply to all which is done within the ship, even though moored in their harbors. Although criminal jurisdiction is never extended beyond the national limits in other cases, the criminal statutes of our own and other governments include offenses committed on shipboard without foreign municipal jurisdictions. (See Halleck, and the numerous authorities he cites, p. 170, § 24, p. 171, §§ 26, *et seq.*)

The general rule in reference to ships, as we understand it, is not to yield the maritime law to any doubtful suggestions of the local power, and in no case to do so where its invasions are unjust and injurious to the general interests of commerce. (*Liverpool Marine Credit Co. v. Hunter*, Law Rep. 3 Ch. Apl. 479; s. c. Law Rep. 4 Eq. 62, commenting upon and distinguishing *Simpson v. Fogo*, 1 Hem. & Miller, 195; s. c. 1 John. & Hem. 18; and see *Cammell v. Sewell*, 5 H. & N. 728, and other cases.)

The decree below is affirmed, except as to the damages. They must be increased by the amount which was deducted on account of the amount paid by the insurance company. (See 1 Pars. Mar. Ins. 442; *Protection Ins. Co. v. Wilson*, 6 Ohio St. 553; *Yates v. Whyte*, 4 Bing. N. C. 272; *Hart v. Western R. R. Co.* 13 Metc. 99.)

This rule seems to be conceded by the appellant, and no present examination has been given it for distinctions which might take this case out of the common rule.

Decree affirmed.

DISTRICT COURT.

WESTERN DISTRICT OF MICHIGAN.

HON. SOLOMON L. WITHEY, DISTRICT JUDGE.

THE DANIEL BALL.

NAVIGABLE WATERS.—POWER TO REGULATE COMMERCE BETWEEN DIFFERENT STATES.—TO WHAT VESSELS INSPECTION LAWS ARE APPLICABLE.

A small steamer was engaged in transporting freight and passengers upon Grand River, between Grand Rapids and Grand Haven, in the State of Michigan. Although her route was wholly within the State, she carried freight consigned to and from other States, which was transhipped at Grand Haven. She also carried passengers on their way to and from Chicago and Milwaukee. In the opinion of the Court, she was subject to inspection and license under the navigation laws of the United States, but as a different view of the law had been taken in the same and other districts: *Held*, out of deference to these opinions, and for the sake of uniformity, the libel should be dismissed.

THE steamer Daniel Ball was libelled for want of inspection and license under the navigation laws. The owners set up by way of defense that the Ball was not, by law, required to be inspected or licensed.

The facts agreed upon were as follows: The Ball was a steamer of 123 tons burden, drawing about two feet of water, running on Grand River, a river entirely within the State of Michigan. She was so constructed as to be incapable of navi-

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gating the waters of Lake Michigan, or of continuing her voyage further than Grand Haven, a port on Lake Michigan, at the mouth of Grand River. She took in freight at Grand Rapids, forty miles up the river, and received and delivered at other places along the river. At Grand Haven her cargo, not previously discharged, was unloaded. A part of her freight was goods and merchandise shipped from Grand Rapids, and destined to places in other States, viz: Chicago and Milwaukee, in Illinois and Wisconsin; but such goods were delivered at Grand Haven, to warehouse and forwarding agents, to whom they were consigned at that port, who forwarded such goods to their place of destination in other States by lake boats.

Passengers were carried by the Ball who were on their way to Chicago and Milwaukee.

The second section of the Act of Congress of July 7, 1838, provides, "that it shall not be lawful for the owner, master, or captain, of any steamboat, * * * to transport any goods, wares and merchandise, or passengers, in or upon the bays, lakes, rivers, or other navigable waters of the United States, * * * without having first obtained a license," etc.

The owner incurs the penalty of \$500 for a violation of this section, and the boat is liable to be proceeded against to enforce the forfeiture against her. The Act requires all such steamers to be inspected annually.

The amendatory Act of August 30, 1852, provides, "that no license, register or enrollment, under the provisions of this or the Act to which this is an amendment, shall be granted, *or other papers issued by any collector*, to any vessel, propelled in whole or in part by steam, and carrying passengers, until he shall have satisfactory evidence that all the provisions of this Act have been fully complied with; and if any such vessel shall be navigated with passengers on board, without complying with the terms of this Act, the owner thereof, and the vessel itself, shall be subject to the penalties contained in the second section of the Act to which this is an amendment."

This Act further provides for the inspection of the hulls of steamers, and of their boilers, engines, etc.

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On the part of the owners, it was claimed that the Act, in terms, goes beyond the constitutional powers of Congress to legislate, inasmuch as it includes boats navigating only the internal waters of a State, which do not transport goods or passengers *between two or more States*. The constitutional provision under which the navigation law in question is passed, is as follows: "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

Mr. *E. S. Eggleston*, District Attorney, for the United States.

Mr. *John S. Newberry*, for the claimant.

WITHEY, J. It has been repeatedly held by the Courts of the United States that a commerce which is purely internal, carried on entirely within a State, *and which does not affect other States*, is not within the power of Congress under the Constitution to regulate, but belongs exclusively to the State.

Commerce is defined to be "an exchange of commodities;" it is "trade and traffic," and "includes navigation and intercourse." The power to regulate commerce, then, includes the power to regulate navigation; but the navigation, like the commodity which is transported for exchange, trade and traffic, must be such as is embraced within and is a part of the commerce among the States. We are brought to the single question, therefore, whether the navigation in which the Ball was engaged on Grand River, carrying goods and passengers exclusively within the State of Michigan but which were shipped for places in other States, is "commerce among the several States." If this question was now presented and to be decided for the first time, I should have no hesitation, from the consideration I have given it, in holding the Ball to be employed in commerce between the States, and liable for the penalty of \$500.

The first authority which I notice is the decision, in manu-

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script, by Judge Wilkins, pronounced in 1856 or 1857, in two cases. The Forest Queen and Pontiac were running on Grand River, which was then within the jurisdiction of what is now the Eastern District Court. Goods and passengers were conveyed on these river boats to Grand Haven, and there transhipped, destined and shipped from inland towns on the river to other States; and goods and passengers coming from other States across the lakes were landed at the mouth of Grand River in Michigan, and there transhipped and conveyed to places in the interior of the State by the Queen and Pontiac.

The learned judge says: "The commerce stopped at Grand Haven, so far as the lake vessels were concerned, and the subsequent instrumentality of Grand River in the business was not such as to constitute this upward, new and interior State navigation, a commerce between Michigan, as to that trade, and other States." Again, "this commerce, then, was altogether internal, and subject only to the control and government of the State of Michigan, and is not within either the letter or spirit of the Constitution."

That case is the only one where the precise question has been before a court and decided, so far as I can discover, that is involved in the case at bar. The following cases cited at the bar are not regarded as presenting the question I am considering, for the reason that in none of them do the facts disclosed show that goods were being conveyed which had been shipped from one State to another: *U. S. v. The Seneca* (10 Law Reg. 281); *Brooks v. Peytona* (2 Law Monthly, 518); *Whittaker v. Steamboat Fred. Lawrence* (Ib. 520); *U. S. v. Steam Ferry Pope* (Newb. 256); *U. S. v. The James Morrison* (Ib. 241); *U. S. v. Tugs W. K. Muir and Davidson* (decision by Judge Miller, in manuscript); *U. S. v. Tug S. K. Kirby* (by Judge Wilkins, in manuscript).

The Steam Ferry Pope, was a ferry-boat across the Missouri, at St. Louis, and it was held that in no proper sense could the Pope be said to be *engaged in any trade*, or be employed in the coasting trade. "A ferry I deem nothing but a continuation of a road." "I admit," says the judge, "that

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Congress might, constitutionally, regulate the transit on roads and over ferries, so far as it is necessary to regulate the commerce with foreign nations, among the several States and with the Indian tribes, but no farther." In *The James Morrison* the same judge discusses the question involved in the case at bar, though not involved in that case, and the argument is an able one in support of the views I have suggested. At page 247, the judge says: "The coasting trade is a part of the commerce among the several States, and it is not the less a part of that commerce because the vessel navigates only from port to port in the same State, up and down a navigable river of the United States, and never goes beyond the State boundary."

I have examined, with care, the other cases referred to and commented upon by the counsel for the owners, viz: *Gibbons v. Ogden* (9 Wheat. 1); *Wilson v. Black Bird Creek Marsh Co.* (2 Pet. 245); *N. J. St. Nav. Co. v. Merch. Bk.* (6 How. 344); *Passenger Cases* (7 How. 283); *Veazie v. Moor* (14 How. 568); *Allen v. Newberry* (21 How. 244); *Maguire v. Card* (Ib. 248).

I am unable to discover that any or all of these cases support the view taken by the defense.

The case of *Wilson v. Black Bird Creek Co.* (2 Pet. 245), was referred to as authority that Grand River is not a navigable water of the United States, and is cited by Judge Wilkins in the *Forest Queen* and *Pontiac* as conclusive authority on that question. I do not understand the opinion of Judge Marshall, in this case, to go so far as is claimed. On the contrary, I regard it to be the well settled doctrine of the Supreme Court of the United States, that all waters within the United States which are navigable for the purpose of commerce, or in other words, waters whose navigation successfully aids commerce, are waters of the United States, and in the late case of *Hine v. Trevor* (4 Wall. 555), it was decided that the admiralty jurisdiction of the United States "extends wherever ships float and navigation successfully aids commerce, *whether internal or external.*" That Grand River successfully aids commerce I need not discuss;

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vessels from Chicago and other lake ports can navigate for miles up this river, and steamers run daily forty miles up its stream. If, then, admiralty jurisdiction may be exercised in a case arising on Grand river, it must be a navigable water of the United States.

In the leading case touching the power of Congress under the Constitution to regulate commerce, of *Gibbons v. Ogden* (9 Wheat.), decided by the Supreme Court in 1824, at page 194, Chief Justice Marshall says: "The subject to which the power is next applied is to commerce among the several States. The word 'among' means intermingled with. A thing which is among others is intermingled with them. Commerce among the States cannot stop at the external boundary line of each State, but may be introduced into the interior. It is not intended to say that these words comprehend that commerce which is *completely internal*, which is carried on between man and man in a State, or between different parts of the same State, *and which does not extend to or affect other States*. Comprehensive as the term 'among' is, it may very properly be restricted to that commerce *which concerns more States than one*."

Was not the merchandise transported on the steamer Ball, shipped and destined for other States, a commerce which affected more States than one? Was it a commerce completely internal, carried on between man and man in a State, or between different parts of the same State, and not extended to or affecting other States?—as it would have been if it were to have stopped at Grand Haven, and not to go on from thence to other States. The carriage between Grand Rapids and Grand Haven was internal, but the commodity carried was proceeding to another State, and such other State, as well as Michigan, was interested in the trade and traffic of that commodity from the time it left Grand Rapids. As an article of export from the latter and of import to the former, both States were interested in the traffic, trade or exchange of that commodity; hence it was commerce among the States.

The means used in transporting that commodity was navigation, which is included in commerce.

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At page 197 of the same case the Court says: "The power of Congress, then, comprehends navigation within the limits of every State in the Union, so far as that navigation may be *in any manner connected with commerce with foreign nations, or among the several States*, or with the Indian tribes." Thus it would appear that the power of Congress to regulate commerce with foreign nations, or among the several States, is co-extensive with the subject itself, and touches and controls both the commodity and the means employed in the conveyance at every step, from the point of shipment to the place of destination, in different States.

At page 204, the Court further says: "If Congress license vessels to sail from one port to another *in the same State*, the act is supposed to be, necessarily, incidental to the power expressly granted to Congress, and implies no claim of a direct power to regulate the purely internal commerce of a State, or to act directly on its system of police."

Clearly, here is an intimation of a power in Congress to require of vessels employed in the coasting trade, *exclusively from point to point in the same State*, to take a license, and it must be upon the ground that such vessels carry commodities which are in transit from a place in one State to a place in another, and therefore engaged in commerce among the States.

In none of the other cases referred to does the Supreme Court of the United States vary the doctrine laid down in *Gibbons v. Ogden*, but, by repeated declarations in discussing the various questions presented, affirm the views which I have quoted from that case. Considerable importance was attached in the argument of this case to *Allen v. Newbury* (21 How. 244), by the counsel for the defense, but I am unable to discover that it is authority against the views which I have expressed. The steamer Fashion was engaged in a general carrying business between ports in different States, and at the time was on a voyage from Two Rivers, in Wisconsin, to Chicago, in Illinois. She was libelled for goods lost on the voyage, which had been shipped on her from Two Rivers to Milwaukee, *in the same State*.

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The Court held there was no jurisdiction, because the shipment of the particular goods was between ports and places in the same State, and therefore not commerce among the States. In speaking of the Act of 1845, the Court says: "There is some ground for saying, upon the words of the Act of 1845, that the contracts over which the jurisdiction (in admiralty) is conferred are contracts of shipments *with a vessel engaged in the business of commerce between the ports of different States*, but the Court is of opinion that this is not the true construction and import of the Act. On the contrary, that the contracts mentioned relate to the goods carried as well as to the vessel, and that the *shipment must be made between ports of different States.*"

Clearly, according to this decision, it is not the fact that the boat does or does not run between places in different States, which determines the character of the commerce carried, as to whether it be purely domestic or among the States. On the contrary, it is whether the shipment "be made between ports of different States;" when this is the case, the vessel carrying that commerce is to be regarded as employed in commerce among the States.

How can it be said that a *transshipment* at the border of the State, into or from which the commodity is shipped, affects the subject of the commerce, and changes that which was commerce among the States to a purely domestic commerce?

When a commodity has commenced to move, as an article of trade or traffic, between a place in one State and a place in another State, it denotes commerce between the States, and the means employed in moving it from place to place, over every part of the entire line, is an employment in that commerce; and it seems to me that a law of Congress which regulates in any respect the means used in the transportation of that commodity is an exercise of the power to regulate commerce among the States, within the Constitution.

It is wholly inadmissible to say that so far as merchandise is conveyed within a State it is purely internal, and becomes commerce among the States only when it is carried between

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States, or from one boundary line to another. If merchandise is taken on board a vessel 100 miles in the interior of a State, and by that vessel is transported without unloading to a point 100 miles in the interior of another State, it involves both navigation and commerce among the States, from the place of shipment to the place of unloading.

Is it any the less commerce among the States, on its entire route, simply because conveyed, for the first fifty or one hundred miles, on a navigable river, by a boat navigating only that river, and entirely within the boundary of a State? Is it any the less such commerce because this boat forms a link in a line of boats, though in no way connected, covering the whole route, and that there is a transshipment on the way?

If I am correct in the views taken, it can hardly be successfully claimed that it affects the question by showing that the goods *cannot* be carried on without transshipment, because of the incapacity of the river boat to navigate the lakes—nor *vice versa*, because the lake boat cannot find a depth of water in the river for her to navigate. The solution of the question lies deeper, and compels us to determine from the subject and the traffic if it be commerce among the States at the time the Ball transported the commodity.

Nevertheless, as the question of jurisdiction in this class of cases is of considerable importance, and a decision by this Court adverse to that given in the *Queen and Pontiac* would not be authoritative out of this District and would result in a want of uniformity in the two Districts of this State as to the liability of boat owners, and inasmuch as I am informed that some of the other judges of the District Courts, having jurisdiction bordering the lakes and on the navigable waters emptying into the lakes, entertain opinions in harmony with those expressed by Judge Wilkins in the *Forest Queen and Pontiac*, it may be advisable to dismiss the libel in this case, for the sake of uniformity of decisions, if for no other reason.

Certainly, one rule, in reference to what classes of boats come within the inspection and license laws, should prevail in all the Districts. Besides, the great experience and learning

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of Judge Wilkins, and of the other judges who are said to hold views in harmony with his on this subject, I may well acknowledge and allow to govern my action in this case, after having given expression to some of the reasons which would control my decision in the absence of such previous rulings.

There is a further consideration which is of weight in determining the course I should pursue, in justice to the owners of the steamers running on the internal waters of the State within this District, viz.: the Government has for more than ten years rested apparently contented with the decision in the *Forest Queen* and *Pontiac*, never having taken an appeal to the Circuit Court. Boat owners had a right to suppose, therefore, that the United States acquiesced in the view of a want of liability on the part of owners in this class of cases.

I am disposed, therefore, contrary to my own judgment upon the law of the case, for the sake of that uniformity which is desirable in the rulings of the District Courts, to dismiss the libel, treating the question as within the rule of *stare decisis*, and to leave it for the United States to appeal to the Circuit Court, if not content.

Libel dismissed.

NOTE.—On appeal, the Supreme Court reversed this decree, adopting the reasoning, but not the conclusion, of the District Judge. See 10 Wall. 557.

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MAY, 1869.

ORDER OF DISTRIBUTION AS BETWEEN MORTGAGEE AND MATERIAL-
MEN, FOREIGN AND DOMESTIC.—LIENS FOR ADVANCES.

Strictly maritime liens have priority over mortgages, without reference to the period of time when they accrued. Material-men, having liens by local laws, have priority over mortgagees in the distribution of the surplus. In this case, the Court ordered the different classes of liens paid as follows: *First*, Maritime

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liens. *Second*, Liens given by State laws. *Third*, Mortgage liens. *Fourth*, The assignee in bankruptcy of the owner.

No unforeseen and unexpected emergency need be shown to warrant a lien in favor of a material-man. Where the master obtains supplies, they are generally supposed to be sold on the credit of the vessel, and in such cases the vessel is liable.

A part owner and general agent and superintendent of a line of boats, of which the respondent was one, has no lien for material, but must be regarded as having given credit to the company.

Advances made by a mortgagee to subsisting lien holders at the time of taking possession under the mortgage should be paid in the order in which the liens themselves would have been paid.

MOTION for order of distribution. The facts appear in the opinion of the Court.

Mr. *Robert Rae*, for the material-men.

Mr. *Chas. Hitchcock*, for the mortgagee.

WITHEY, J. There has been a decree in favor of the libellants; the vessel has been sold; the proceeds paid into the registry, from which libellants have been paid their decree and costs, and there remains a surplus of \$24,046 20. Nine supplemental suits, by petition, have been entered by rival claimants against these proceeds. They are, by material-men, under contracts civil and maritime; material-men, under statutory liens; a mortgagee, under a mortgage duly recorded according to the Act of Congress; and the assignee in bankruptcy of the owners. The fund is not sufficient to satisfy all.

The principle is laid down by the Supreme Court of the United States, in *Andrews v. Wall* (3 How. 568), that it is an inherent incident to the jurisdiction of the Admiralty Court, to entertain supplemental suits by the parties in interest, to ascertain to whom those proceeds rightfully belong, and to deliver them over to the parties who establish the lawful ownership thereof.

The Admiralty Courts of this country have generally applied this principle to claims arising upon liens given by State statutes, and to mortgages, as well as to strictly maritime liens.

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The important question, therefore, is as to the order of payment.

As between the claimants before the Court, maritime liens have priority over all the others; this was conceded at the hearing.

Until recently, we find no decision that does not give to the material-men having subsisting liens by local laws priority over a mortgagee in the distribution of surplus, while there are decisions giving priority to such material-men. (*The Troy and Superior*, 1 Newberry, 176; *The Paragon*, Ware, 322; *Hendrick Hudson*, W. L. Monthly, 363; *Justi Pon v. The Proceeds of Brig Arbustoi*, 6 Am. Law Reg. 511; *Brig Minnie*, 6 Am. Law Reg. 328; *Provost v. Wilcox*, 17 Ohio, 359.) Counsel for mortgagee has read a newspaper report of the case of the *Grace Greenwood*, recently decided by the District Court of Northern Illinois, postponing material-men under local laws to the mortgage lien, on the ground that the mortgage becomes, by its record in the office of the collector of customs, as strong in equity as the claims of the material-men, and applies the surplus upon the principle that "that which is first in time is strongest in right." As will be seen by the authorities, this decision is at variance with former decisions, and it does not commend itself to our judgment. The water craft law of Michigan, under which some of the claims arise, postpones the mortgagee to the material-man, without reference to date of liens. Strictly maritime liens have always held priority over mortgages, without reference to the period of time when they accrued, on the ground that it is as much for the interest of the mortgagee as for the owner, that the ship should be kept in repair and supplied, to enable her to keep afloat and be in receipt of earnings; thus adding to the value of the mortgage security, as well as to the ability of the mortgagor or owner to pay the mortgage. We do not see why material-men, holding liens by the local law, have not the same position of priority as regards the mortgagee, and for an equally good reason, as is conceded to material-men having strictly maritime liens.

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We do not understand the law of Congress, in reference to recording mortgages, as affecting the question.

We, therefore, hold to the following order of payments and priorities, as between the parties before the Court:

First.—Maritime liens.

Second.—Liens given by State laws.

Third.—Mortgage liens.

Fourth.—The assignee in bankruptcy of the owner.

Before referring to the individual claims, we notice a point made by the mortgagee against a portion of the claims presented, viz: that no *unforeseen and unexpected emergency* is shown, and which it is claimed is necessary to justify holding that a lien exists.

Until the case of *Pratt v. Reed*, decided in December, 1856, by the Supreme Court of the United States, 19 How. 360, it had not been regarded as necessary to a maritime lien, that any unforeseen and unexpected emergency should exist for materials and supplies to a ship, when obtained by the master. And it has been questioned by high authority, whether the Court, by that case, intended to change the law of liability for supplies to a vessel. The Court does not intimate any such intention, and does not review the authorities or refer to the previous rulings of the Courts of Admiralty. The facts of the case were that the owner, who was also master, procured the supplies without any representations of necessity, and apparently under some general understanding and arrangement, which raised the presumption "that there could be no necessity for the implied hypothecation of the vessel."

His Honor, Mr. Justice Swayne, at the June term, 1868, of the United States Circuit Court, at Detroit, is reported to have held, in the case of *The Propeller Pittsburgh*, "That the case of *Pratt v. Reed*, 19 How., had not altered the law of liability for supplies furnished to a vessel. Where the master obtains supplies, they are generally supposed to be given on the credit of the vessel, and, in all such cases, the vessel is liable for them."

Recently, his Honor, Mr. Justice Davis, in the United

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States Circuit Court, at Chicago, held, that to create a maritime lien for supplies, it must appear not only that they were needful, but the existence of some unforeseen and unexpected emergency must be shown (*The Lady Franklin*, 1 Chicago Legal News, 273), thus, as we understand, holding that *Pratt v. Reed* did alter the law of liability for supplies, to which case the learned judge refers. In view of the rulings of the two distinguished members of the Supreme Court of the United States, taking different grounds as to the import of the decision in *Pratt v. Reed*, it may be said the question is still an open one. We feel bound to follow the ruling of Judge Swayne; besides our own judgment is that such is the correct view.

In reference to the individual claims, under the views already given, we regard the claim of James E. Stevens as possessing no merits. Stevens was one of the owners, and was general agent and superintendent, at St. Joseph, Michigan, of the line of boats owned by the company—The Lake Michigan Transportation Company. He held sixty thousand dollars of the stock of the company; moneys were received by him during the season of navigation, and he must be regarded as having given credit to the company, and not to the vessel.

Hollister and Phelps, of Chicago, claim a lien under State laws—\$1,978 11, accruing between June 27 and October, 1867, the balance between March 27 and April 4, 1868. By the laws of Illinois, a claimant must assert his lien against a vessel within nine months after the same is due, or the lien ceases as against subsequent incumbrancers, creditors, and *bona fide* purchasers.

The vessel was taken possession of by the Third National Bank of Chicago, for breach of the conditions of its mortgage, October 16, 1868, and the libellants, Miller & Miller, did not file their libel until November 13.

No excuse, therefore, is shown for delaying to assert this claim of 1867, until April 23, 1869. It must, we think, be postponed, at least to the payment of all the other subsisting claims; their claim, which accrued during the season of 1868, is allowed.

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Farrar, Taft & Knight, of Buffalo, claim a maritime lien for materials and supplies which accrued between May and September, 1867. The greater portion of this claim is for machinery sent from Buffalo to Chicago on an order, and there delivered to, and received by, the vessel. This was a contract for which the owner would be liable, but creates no lien against the vessel. The other part of the claim, and that earliest furnished, has been allowed to lie so long without being asserted, that as against the other subsequent and subsisting claims by material-men and the mortgagee, it should be regarded as stale, and be postponed to all the others, except the owner or his assignee.

Good & Co., of Chicago, claim both a maritime lien and, under the water craft law of Michigan, their claim is allowed, as are also the claims of Pratt & Coulson, Aaron D. Rowley, and R. A. Kapp & Co.

The mortgage claim of the Third National Bank of Chicago is allowed, together with such advances as were made by it to subsisting lien holders, when it took possession of the vessel under the mortgage, such advances having been made to seamen and others, to save expense and delay that would grow out of suits threatened against the ship. These advances will be paid in the order already announced in reference to priorities.

The amounts of the respective claims will be ascertained, and payment decreed accordingly.

Order of distribution.

NOTE.—Under the recent decision in the case of *The Lotawana* (21 How. 558), the principal question involved here becomes of considerable importance. (See *The Grace Greenwood*, 2 Biss. 131; 2 Pars. on Ship. 149; *Reeder v. George's Creek*, 3 Am. Law Reg. 232; *Scott's Case*, 1 Abb. U. S. 336; *The Harrison*, 2 Abb. U. S. 74.)

CIRCUIT COURT.

EASTERN DISTRICT OF MICHIGAN.

HON. HALMER H. EMMONS, CIRCUIT JUDGE.

THE WILLIAMS.

MARCH, 1873.

**JURISDICTION.—EXECUTORY MARITIME CONTRACT.—LIEN.—EFFECT
OF PART PERFORMANCE.**

A tug was hired at \$200 per day to go to the assistance of a vessel which had been reported aground on the shore of Lake Huron. On arriving at the spot, it was found the vessel had been gotten off, and the tug returned home without rendering her any actual assistance. *Held*, a proceeding *in rem* would lie to recover the stipulated compensation.

All maritime contracts made by the master, within the scope of his authority as master under the maritime law, *per se* hypothecate the ship, and performance, in whole or in part, does not affect the question of jurisdiction generally, or the character of the proceeding, whether *in rem* or *in personam*.

A libel *in rem* for salvage services will be sustained, though the contract was for a *per diem* compensation, not contingent upon success.

The nature of maritime liens discussed, and the authorities reviewed.

THE libellant, John Demas, owner of the tug U. S. Grant, claimed a lien upon the brig Williams, under the following state of facts:

On the 4th day of June, 1871, the brig was aground at Bing Inlet, on the Canadian shore of Lake Huron. On that day the master of the brig employed the tug at Detroit, her home port, to go to the brig's rescue, under a special contract

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to pay her \$200 per day, from the time she should leave Detroit till her return, and \$200 additional for use of hawser; which compensation was to be paid at all events, whether the services of the tug should result in, or contribute to getting the brig off or not. The tug left immediately to enter upon the service, but in approaching the place where the vessel had been, and probably was at the time of the agreement, aground, it was found that she was already afloat, and the services of the tug had become unnecessary. Thereupon the tug returned to Detroit. She was absent a little over five days, and the gross amount of her compensation was settled by the master at \$1,100, for which a draft was given. The draft having been protested for non-payment, this suit was brought, and the draft tendered to be delivered up.

The following opinion was delivered by the District Court (Judge Longyear):

That the contract was maritime in its character, and that the claim for compensation under it would constitute a valid cause of action in admiralty, *in personam*, is not seriously disputed, and I think does not admit of doubt. The question is, has the libellant a lien upon the vessel?

If, by operation of law, the contract itself raises a lien, then the present action *in rem* will lie, and the lien must be enforced, notwithstanding the ultimate object and purpose of the contract became unnecessary, or for any purpose impossible of performance, libellant having performed on his part so far as he could. If, however, no lien was created by the contract, then, as no service to the vessel was actually rendered, it is difficult to see how, or on what principle, a lien has arisen.

Was a lien created by the contract? I think not. The service contracted to be rendered—that is, the ultimate object and purpose of the contract—was purely a salvage service. A lien on account of a salvage service arises because, and only because, something is saved by the service, or that service has contributed towards saving something, and then only upon what has been so saved. These constitute the very essence of a lien for salvage. A lien then arises out of, and exists only on account of, *the fact of salvage*, and not on account of any

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contract under which the service may be rendered. When the service is rendered under contract, the contract is resorted to for the purpose of fixing the compensation, and not for the purpose of creating a lien. The law settles the question of lien in all cases of salvage where the contract is silent upon the question, and is not of such a character as to preclude a lien which might otherwise exist. Where a salvage service is actually rendered in a case like the present, there is no doubt the lien thereby created extends to the entire time employed, including going and returning (*The Independence*, 2 Curt. 350). But this is because the time spent in going and returning is incidental to the salvage. If the salvage fails, or is wanting, of course the lien and all its incidents fail (*The Narragansett*, Olc. 388, 392).

There is much force in the analogy suggested by counsel between the present case and the case of an executory contract of affreightment. In such cases a lien arises and can exist only with the actual delivery of the freight on board, or what is in law equivalent to such delivery. Now, suppose a vessel is employed at Detroit to go to Cleveland, or other port, for some specific cargo which is there and ready for shipment, for a fixed *per diem* compensation for the entire service, including going and returning. The vessel actually enters upon the performance of the contract on its part, by going to Cleveland, or other port, where the cargo was when the contract was made and when its performance was so entered upon, and there finds that the cargo has already gone forward, or for some reason its transportation has become unnecessary or impossible, and the vessel returns to Detroit. While there is no doubt an action *in personam* would lie for the time spent, no one would contend for a moment that a lien on the goods for freight was thereby created. It seems to me the case supposed and the one under consideration are quite analogous.

If necessary, this case might be disposed of adversely to the libellant, on another ground, and that is, the contract being for a fixed price, *to be paid at all events* and in no manner dependent on success (the contract being for a *salvage service*), no lien upon the vessel could result in any event. This Court, at the November Term, 1871, so decided in the case of *The Marquette*. (See also the following cases: *The Whitaker*, Sprague, 229, and the same case, p. 282; *The Independence*, 2 Curtis, 350, 355; *Squire v. One Hundred Tons of Iron*, 2 Benedict, 21; *The Camanche*, 8 Wall. 477.) But in-

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asmuch as under the view already taken, it is unnecessary to a decision, I do not put the case upon that ground.

The learned advocate for libellant, seeing the difficulties in the way of maintaining a lien for salvage, asked and obtained leave at the hearing to amend his libel by striking out "salvage" as the cause of action, and inserting in lieu thereof, "contract, civil and maritime." I fail to see, however, that this improves the matter in the least. In fact, as it seems to the Court, the concession admits the case against the libellant on the question of lien. The contract was for the performance of a *salvage service*, and if a lien cannot be maintained on that ground (and we have seen it cannot), it cannot be maintained on any other. In order to do so, the Court would have to construe the contract to mean something different from its express terms, and thus make a new contract for the parties, which, of course, will not be done.

The libel must be dismissed, with costs to the respondent; but inasmuch as the point upon which the decision is based, was clearly presented on the face of the libel, and therefore might and ought to have been raised by exception, all costs of witnesses and taking testimony must be omitted in the taxation. The decree must be without prejudice to such other action as libellant may see fit to bring for the recovery of his claim.

An appeal was taken by the libellant from this decree.

Mr. *H. B. Brown*, for libellant and appellant.

Objection is made to a recovery upon the sole ground that although the tug entered upon the performance of her contract, and proceeded to the place where the vessel was lying, she did not actually take her line or pull her off. It is conceded that if she had actually pulled the vessel off, she would be entitled to recover not only for this service but for going and returning for that purpose. It is also conceded that if the tug had taken her line and made an effort in good faith to pull her off, she could have recovered though that effort was entirely futile. There seems to be, therefore, in the opinion of claimant, some magic about the physical connection between the tug and the vessel that gives the lien.

It is unnecessary to consider whether a proceeding in ad-

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miralty can be maintained for the breach of a purely *executory* contract. All we claim in this case is that where a vessel has once *entered upon the performance* of a maritime contract, she is entitled to recover for the services actually rendered, though they were of no benefit to the vessel.

The general rule is well settled that wherever in a maritime contract there is a remedy against the owner, there is also a lien upon the vessel (*The Druid*, 1 W. Rob. 399; *The Bold Buccleugh*, 2 E. L. & E. 536; *The Sch'r Freeman*, 18 How. 182).

All contracts of the master within the scope of his authority, give a lien (1 Pars. on Ship. 173, note; 2 *Ib.* 178, note 5; *The Paragon*, Ware, 322).

It is held that although a ship has no lien upon the cargo before it is received, the lien attaches the moment it is shipped on board, and she cannot be compelled to give it up until the freight is paid (1 Pars. on Ship. 175; *Bulkeley v. Naumkeag Cotton Co.* 24 How. 386; *The Hermitage*, 4 Blatch. 474; *The Gen. Sheridan*, 2 Ben. 294; *The Pacific*, 1 Blatch. 569).

There is no difference in principle whether the tug takes the vessel's line or not. She may not render her a particle of service, and may even injure the vessel, and yet it is not denied she would have a lien. The following cases dispose of the question of the necessity of *physical connection* with the vessel to confer a lien. *The Pacific* (1 Blatch. 569), where an action *in rem* was sustained for the breach of an executory contract to carry a passenger. *Bulkeley v. Naumkeag Steam Cotton Co.* (24 How. 386), in which a vessel was held liable for the loss of a cargo after it was delivered to a lighter, but before it was shipped on the vessel (See remarks as to physical connection, p. 393).

The rule is well settled that if supplies are bought for a vessel upon the representation they are necessary, the vessel is held, though in fact they are not necessary, and though they were never placed on board at all (*The Gustavia*, Bl & How. 189; *Bryan v. Pride of the West*, 12 Mo. 371; *Gibbons v. The Fanny Barker*, 40 Mo. 253; *Merritt v.*

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Brewer, 14 Law Rep. 452; *The Kearsage*, Ware, 546, 554; Brightley's Fed. Digest, p. 799, sec. 500; *Sewall v. Hull of New Ship*, Ware, 565; *The Walkyrien*, 3 Ben. 394). In the case of *The Canada* (Bee, 90), salvage was awarded for consorting an injured vessel, though she was not touched by the consort; and, in *The Underwriter* (4 Blatch. 94), it was given to a vessel which "lay to" near a vessel in distress, though no assistance was actually rendered. The question involved in this case is also discussed in *The Susan* (1 Sprague, 499), and an opinion expressed in favor of a lien (see 2 Pars. on Ship. 287, 144).

In the following cases actions were maintained, based upon a simple tender of services: *The America* (1 Lowell, 177); *Ex parte McNeil* (13 Wall. 236).

It is unnecessary to determine whether a lien is created by the contract. There are a few cases which indicate that an action *in rem* will not lie for the breach of a purely executory contract, but on examination they will be found confined to preliminary contracts or to contracts of affreightment in which the lien is in the nature of a common-law lien, and dependent upon possession (*Andrews v. The Essex Ins. Co.* 3 Mason, 6; *The Tribune*, 3 Sum. 144; *The S. C. Ives*, Newb. 205; *The Gen. Sheridan*, 2 Ben. 294). There are dicta to the same effect in the following cases: *The Schr. Freeman* (18 How. 182); *Vandewater v. Mills* (19 How. 82). In *The City of London* (1 W. Rob. 89), a mariner was discharged after the articles had been signed, but before the commencement of the voyage: Held, that as the voyage had been performed he could sue in admiralty for his wages.

As nothing remained to be done in this case except payment of the money, the contract was clearly *executed* (2 Greenl. on Ev. sec. 104).

Mr. W. A. Moore, for claimant and appellee.

The contract was a personal one, and created no lien upon the vessel. A maritime lien is a *jus in re* (*The Globe*, 2 Blatch. 427; *The Young Mechanic*, 2 Curtis, 406; *The Kim-*

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ball, 3 Wall. 37). To create a lien for supplies, there must be a necessity for supplies and a necessity for credit (*Pratt v. Reed*, 19 How. 359; *Tod v. Sultana*, *Ib.* 362).

A contract to take care of a ship in port and the performance of the service, does not create a lien (*Levering v. Bank of Columbia*, 1 Cranch C. C. 152-207; *Phillips v. The Scattergood*, Gilpin, 1; *Gurney v. Crockett*, Abbott's Adm'y, 490). There is no lien for a stevedore's services (*The Amstel*, 1 Bl. & How. 215; *The D. C. Salisbury*, Olcott, 71). The master has no lien for his wages (*The Grand Turk*, 1 Paine, 73; *The Orleans v. Phæbus*, 11 Pet. 175).

The language used in the *Druid* and *The Bold Buccleugh* is not approved in the case of the *Schooner Freeman*.

In the case of the *Druid* the question was whether the owners were responsible for damage willfully done by the master when not acting within the scope of his authority. In the *Bold Buccleugh*, the question arose whether the pendency of a common law action, for a collision, could be pleaded in abatement of a suit in admiralty *in rem* for the same collision. The case of *The Pacific* (1 Blatch. 569), was decided by Judge Nelson in 1850; the case of *Vandewater v. Mills*, decided in 1856, overruled *The Pacific*, and Judge Nelson himself recognized this fact in the case of *The Hermitage* (4 Blatch. 474). And so Judge Blatchford held in the case of *The Gen. Sheridan* (2 Ben. 294). In *The Lady Franklin* (8 Wall. 325), the Supreme Court adheres to the principle that the vessel is not bound except where the cargo is shipped.

The cases cited by libellant, where the vessel was held for supplies "furnished" *for* her, but not delivered *to* her, were all dependent upon a State statute, except *Merritt v. Brewer*. A maritime contract does not necessarily include a maritime lien (*The Kiersage*, 2 Curtis, 421, 424; *Vandewater v. Mills*, 19 How. 82, 89, 90, 91).

EMMONS, J. Having recently, before the argument in this cause, decided in the case of the steamer *Robinson*, in the the Western District of Tennessee, substantially the principle

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here involved, we should not, but for the history of the cause, have deemed the question one of doubt. Without any very thorough examination at the time, but drawing mainly upon what we had ever assumed to be the law, we ruled that all maritime contracts made within the scope of the master's usual authority did *per se* hypothecate the ship; and that those of affreightment, insurance, towage, the fitting out and discharge of vessels, and for aiding them in distress, were instances only of the application of the rule. After such examination as the great pressure upon our time will permit, we see no reason to modify this ruling; but hold that the contract in this case did *ex vigore*, the instant it was consummated, pledge both vessels, that which was to aid and that to be aided, for the security of the agreement. Performance in whole or in part works no consequence in reference to jurisdiction generally, or in the character of the remedy, whether *in rem* or *in personam*. It affects only the measure of recovery.

The practical importance of this question to our north-western commerce; the numerous analogous rights which will fail of protection by even a limited application of the contrary doctrine; the protective power which the jurisdiction we sustain will exert in preventing the disregard of agreements; and the fear that a brief unreasoned judgment may be less influential to extend and support it, is our excuse for pursuing somewhat at length the reasons for our ruling, although forced to do so with much want of form.

That contracts for salvage, towage and of affreightment, are in the most unqualified sense maritime, and therefore of admiralty cognizance, will not be questioned, and that *New Jersey Co. v. The Merchants' Bank* (6 How. 344); *Morewood v. Enequist* (23 How. 493); *Ins. Co. v. Dunham* (11 Wall. 1), and the authors and judgments they refer to, bring within the rule the contract in this case, will be as readily conceded. The denial extends only to the remedy *in rem*.

We infer that one of the reasons for the decree of the District Court is that this is at least in the nature of *salvage* service, and as the libellant did not by his efforts save anything,

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there is no remedy *in rem*. *The Camanche* (8 Wall. 477); 2 Pars. Adm'y, 283, and cases cited; Benedict's Ad. Pr. sec. 300 to sec. 300 *e*; *The Henry Ewbank* (1 Sum. 416); 4 Wash. C. C. 651; 1 Newberry, 428, 438; 1 Conk. Ad. 352, which say salvage is earned not by an *attempt* but by *actual* rescue, assert no doctrine having any tendency to inhibit this proceeding. They and the numerous kindred judgments and authors deny only the *extraordinary* compensation given for salvage service. There is no intimation that a remedy against the ship, if it is saved, will be denied if the agreement was for payment absolutely. The same remark is equally true of all the cases and authors which say if the agreement is for such absolute payment, irrespective of results, there can be no reward for salvage properly so called. They all relate to compensation only, but not in any case to a denial of the proceeding *in rem*. Thus, the case of *One Hundred Tons of Iron* (2 Ben. 21), is understood by counsel to deny all remedy against the ship. As the sole authority for what it does in this regard decide, *The Independence* (2 Curt. 350), is cited, in which, after a careful discussion of this question, Judge Curtis takes pains to say he does not decide that in a case like that now before us there is no jurisdiction *in rem*. On the contrary, with manifest approbation, he refers to the judgment of Judge Conkling in *The A. D. Patchin* (1 Blatch. 414), affirmed on appeal by Judge Nelson, in which there was a contract precisely like that here set up, to labor for the rescue of the ship for a *per diem* compensation, and where both judges sustained a proceeding *in rem*, as consistent with the other wholly distinct rule that there can be no extraordinary compensation in such case. At page 418 it is said: "For all maritime contracts which the master is authorized to make, there is an implied hypothecation of the ship. There was authority to employ others to aid in preserving the ship, and I imagine that such a contract, subject to the revisory powers of the Court, would create a lien on the vessel." *The Emulous* (1 Sum. 207), *The Centurion* (Ware, 477), *The Pigs of Copper* (1 Story, 314), are reviewed, and the principle deduced that suits for salvage may be maintained,

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although there is an agreement for a fixed and absolute compensation.

This judgment is referred to in this connection more particularly to illustrate the position that a denial of salvage is not a rejection of a proceeding *in rem*, but it quite as fully sustains the broader proposition soon to be considered, that all authorized maritime contracts pledge the vessel for their performance.

It will be noticed the term *salvage* is used to denote the nature of the service, even where an absolute compensation is agreed on. And so are other cases. In *The Versailles* (1 Curtis, 353), Judge Curtis remarks that he doubts whether there is any such head, properly speaking, as *towage*. It should all, he thinks, be termed *salvage*, whether the ship is in distress or not, whether there is an agreed price or for fixed wages, as in the case before us.

It is, however, but a name. He followed only what Judge Story a little less plainly said in *The Emulous* (1 Sum. 210), where he was seeking to lodge the power under some well-known head and among the old, familiar classes of admiralty jurisdiction, that it might escape the contests in the Supreme Court. That high tribunal has now settled this and some other questions, fortunately for the commerce of the country, and declared that over *all* maritime contracts our Courts have cognizance, and that our only duty is to determine they are such. We need not now, in order to take jurisdiction, maintain that the towage of a staunch and seaworthy ship through the safe and land-locked straits of Detroit is a *salvage* service. We believe that the partial adoption of this inapplicable nomenclature is the parent of the objection in this case. It illustrates the impolicy of applying names to things and acts in unusual senses. Towage, however, is generally called towage, and jurisdiction over it taken not because it is salvage or in the nature of salvage, but because it is performed in pursuance of a maritime contract over which the Constitution and laws give the District Courts jurisdiction.

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In most such cases the more appropriate, but, in our opinion, unnecessary terms of ordinary and "*extraordinary towage*" are employed. (See *The Princess Alice*, 3 W. Rob. 138; *The Kelly*, 1 Eng. L. & Eq. 596, note 1; *The Kinglock*, *Ibid.*) Dr. Lushington points out at length the difference between salvage and towage, and what he terms extraordinary towage, the latter being such as demands some extra labor. He cannot, he says, where all is fair, break in upon agreements for the latter, and allow salvage properly so called. *The Harbinger* (20 E. L. & Eq. 641); *The Graces* (2 W. Rob. 294), were like cases, where similar terms, familiar in England, are used. In the latter, it is said, the *going to* the ship was a *part* of the services as much as the labor after arrival. (And see *The White Star*, Law Rep. 1 Ad. & Ec. 68; *The Banner*, 14 Law Rep. 465.) Judge Wilkins, in this District, said, there was a lien for towage; that it might be necessary in cases of stranding.

The Susan (1 Sprague, 499), and many of the more modern American cases employ the same terms, and treat the jurisdiction, as it should be, as depending upon a maritime service and contract only.

Rightly understood, of course, no influence upon jurisdiction and remedies should be wrought by the accidental use of either class of names. The contracts and acts involved are alone material. It becomes worthy of notice here only in the supposition that analogies have been sought in the doctrines of salvage to deny a jurisdiction *in rem* for the violation of a familiar maritime contract, because the labor of the libellant in the accidents of its performance was not instrumental in relieving the Williams. The attempt under this contract for absolute payment by the day, irrespective of results, bears no more analogy to salvage, properly so called, than do the services of the fireman and the engineer.

It is, however, broadly contended in argument here that, irrespective of all notions peculiar to salvage, there is no hypothecation of the ship while the contract is executory. That, unless the performance is entered upon in such mode as to bring the subjects of the agreement into actual contact, there

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can be no remedy *in rem*. We were referred to no judgment or book countenancing such a doctrine beyond *The Freeman* (18 How. 182); *The Yankee Blade*, or *Vandewater v. Mills* (19 How. 82), which, in their now expressly overruled *dicta*, do sustain in some degree such a doctrine in reference to contracts of affreightment. They affirmed *extrajudicially* that there was no lien in favor of the shipper until the cargo was *laden on board*. From this error it was argued that, unless the tug in this instance actually laid hold of the Williams, and made at least a single pull, she was not drawn within the jurisdiction *in rem*. It will be seen that even this far-fetched analogy fails not only for want of similitude, but the doctrine from which it is sought to be deduced, never had a resting place in law.

We think it may now be considered as settled that such a delivery to a carrier as imposes upon him the extraordinary liabilities attaching to his character creates a lien upon the ship to secure the performance of the contract of carriage. There is no necessity for actual contact of cargo with ship. Whether there is a remedy *in rem* where there has been no delivery, has not as yet been decided by the Court of last resort, but in the absence of all authority to the contrary and sustained by express judgments in the District and Circuit Courts, and, as we said upon the argument, by what we deemed unquestionable principles, we should readily sustain a libel for the breach of a contract of affreightment wholly irrespective of delivery to the carrier. Such act may, and in most instances would, be requisite to launch the duty of carriage. But jurisdiction *in rem* does not depend upon it. That vests, if without it a maritime contract within the usual authority of the master has clearly created a duty to carry, to tow, to aid in distress, or do any other act within the common duties of the department of commerce in which the vessel is engaged. If the agreements are obligatory, and the conditions for performance occur as contemplated, they do, of their own force, hypothecate the ship. The contract, the obligation which it imposes, does so.

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In *The Edwin* (1 Sprague, 478, affirmed in 24 Howard, 386), was sustained a proceeding *in rem* for the loss of cotton upon a lighter on its way to the ship. Judge Sprague reviews the 18th and 19th Howard, and anticipates what the Supreme Court on appeal says of the *dicta* in those two judgments. He says it is worthy of much consideration whether there is not a hypothecation of the ship by a contract of carriage without any delivery to the carrier, and cites *The Flash* (Abbott Adm'y, 70), decided by the learned Judge Betts, of the Southern District of New York, so holding, but adds that, subsequently, in 1857, according to a newspaper report, he refused to enforce the doctrine in obedience to the *dicta* in 18th and 19th Howard. They out of the way, *The Flash* is not extinguished, although the learned judge who decided it felt himself no longer at liberty to follow its light. In *The Edwin*, or *Bulkeley v. The Cotton Co.* (24 How.), the Court say that what is said in 18th and 19th Howard, and in *Grant v. Norway* (2 Eng. Law & Eq. 337), all refer to circumstances where there had been no such delivery as to impose on the carrier the duty of carriage or to care for the property. It is said "the unloading of the goods at the end of the voyage, on the wharf, does not discharge the lien, and we do not see why the lien may not attach if the cargo is delivered to the master before it reaches the hold of the vessel, as consistently as its continuance after it is unloaded on the wharf or within the warehouse." The scope of what is here meant will be better understood in connection with the at one time much discussed, but now settled doctrine in all Courts, English, Federal and State, that a delivery at the usual place where a carrier receives goods, whether upon a wharf, in a warehouse of his own or others, fixes his liability as insurer. (See Angell on Carriers, secs. 129 to 148; 2 Red. on Railways, 55 to 59; Benedict's Ad. Pr., sec. 287; 1 Conk. Ad. Pr. 193; 1 Pars. Ad. p. 183.) Nowhere is any distinction made between the absolute liability of the carrier as insurer and the right to enforce it by a proceeding *in rem*, the abandoned *dicta* in 18th and 19th Howard, and the few cases dependent upon

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them excepted. In *The Steamer Robinson*, before referred to, we had occasion to go somewhat into the distinction between contracts which did and those which did not bind the ship *in rem*. We found the line wholly drawn between those which were maritime and the undertakings of the master in reference to the sale of the cargoes and return of proceeds, and other similar agreements collateral to his ordinary *ex officio* duties. We held that an agreement to collect and pay over the sum due upon a bill of goods, although contained in what was called a "collect on delivery," or a "*C. O. D.*" bill of lading, did not authorize a proceeding *in rem*. But it was because it was not maritime, was an impolitic extension of the lien to cases not coming within the reason of the rule. 2 Pars. Ad. 252, cites the judgment in *The Edwin* to the position "that the liability to proceedings *in rem* commences by reception of the goods on board or at the wharf; that it continues after they are unladen." (See *The Tangier*, 21 Law Rep. 6.) *The General Sheridan* (2 Ben. 294) was a libel against a vessel for refusing to proceed to the ports named in a charter party. Judge Blatchford conceded that *The Pacific* (1 Blatch. 570) was full authority to sustain the proceeding. It enforced a right *in rem* where the ship was not fitted out according to agreement, and a passenger refused to go on board, and in which Judge Nelson, sustaining a proceeding *in rem*, used as an illustration a refusal to carry out an executory contract to transport goods. But Judge Blatchford felt he could not follow *The Pacific*, as Judge Nelson had himself, in *The Hermitage* (4 Blatch. 474), in obedience to the *dicta* in *The Freeman* and *The Yankee Blade*, announced a contrary rule. He therefore, manifestly against his own convictions and the logically sustained judgments of Judge Betts in *The Flash*, Judge Nelson in *The Pacific*, those of Judge Ware hereafter cited, and the *dicta* of Judge Sprague in *The Edwin*, dismissed the libel. But the then and now conditions of opinions in the Supreme Court render *The General Sheridan* an authority so far as the opinion of the able judge who decided it is such for sustaining a libel against a ship for refusing to call for passengers or freight at the

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places and in the times where those who are authorized to make obligatory contracts agree she shall go. 1 Par. Ad. 183, repeating the doctrine that delivery on the wharf binds the carrier, and showing in the note that he means binds the ship as well, refers to the MSS. decision by Judge Betts, in which he refused to follow *The Flash*, and says the cases in Howard and Curtis do not compel his departure from his former ruling, and that *The Edwin* (24 How. 386) sustains his own text. So far, therefore, as the decree below may be supposed to rest upon the assumption that there is no remedy *in rem* for the breach of a wholly executory maritime contract to carry goods, we think it fails of support.

The rectitude of the jurisdiction now taken, however, may be vindicated more fully than simply to answer the accidental objections made to it. It may be quite true that the analogies from the doctrines in salvage fail because the service is not such, and that the breach of an executory contract of affreightment may be compensated by proceedings *in rem*, and still the present decree fail of affirmative support. We do not repose upon this negative argument. The wider principle, that every maritime agreement binds the ship as well as the owner, is that upon which we rest our decision.

That such is the law of the American admiralty, and substantially so, as now restored, of the English, and that the ship is bound by the contract, and not by force of part performance, will be seen by the following judgment and authors. It would be a mere affectation to go back of the more modern decisions, which, if we might suppose what no one suggests, that they misconceive the older doctrines, are nevertheless in the conditions of this Court to be followed. No separation of cases which announce the general rule, and those which apply it, where the services have not been rendered in, or upon, or in contact with the ship will be made. Judgment in the erroneously so-called salvage cases and towage cases, where the agreements are implied from signals and circumstances, are promiscuously referred to, as their applicability will be sufficiently apparent.

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In *Ins. Co. v. Dunham* (11 Wall. 1), although a proceeding *in personam* upon a policy of insurance, its mode of argument and approval of cases would, without more, oblige our inferior Courts to say that for all purely maritime contracts there is a remedy *in rem*. It extensively reviews the former judgment, and sums up its able argument by the broadest announcement of the jurisdiction generally, and declares that "the only duty is to apply the general principle to the differing cases as they arise." From *The Belfast* (7 Wall. 624), is quoted "that contracts, claims or services purely maritime are cognizable in the admiralty," and from *Morewood v. Enequist* (23 How. 493), that part of Judge Grier's opinion which says that "over all maritime contracts there is jurisdiction in the admiralty, both *in rem* and *in personam*." *New Jersey Co. v. Merchants' Bank* (6 How. 344), is referred to, and the following passage from Judge Nelson's opinion approved: "If the cause is maritime the jurisdiction is as complete over the person as over the ship. It must, in its nature be *complete*; it cannot be confined to *one* of the remedies on the contract where the contract itself is within its cognizance." In the 6 How. 344, the contest was whether the proceeding must not be solely *in rem*, and the learned argument of counsel as well as its treatment by the Court show how free from doubt is such a remedy here. We do not overlook the fact that these broad announcements are not literally and universally applicable. The exceptions, however, are so far from this case that it would be a useless criticism to suggest them. In the *Bags of Linseed* (1 Black, 108), Ch. J. Taney says, "as contracts of affreightment are *maritime* contracts there is jurisdiction *in rem*." After the decision in 6 How., this was not doubtful, but it is now referred to for the reason and ground of the proceeding. It is the contract which gives it, not a service or act in a *locus* within the territorial jurisdiction of the admiralty, as is necessary to give cognizance of a tort. Among the leading and learned judgments upon this subject, are those of Judge Ware. They have been repeatedly approved by the Supreme Court. In *The Paragon* (Ware, 322), he says: "Every contract of the master, within

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the scope of his authority, binds the vessel and gives the creditor a lien for security;" and in *The Phebe* (Ware, 363), in an instructive opinion, the lien is asserted and traced to the maritime law, and its original reason thought to be found in that feature which confined the owner's liability to the value of the ship. But another and leading one, undoubtedly, is the fugitive character of the property and agents, and the almost universal absence of the obligated persons and the impracticability and expense of seeking them. *The Robert J. Mercer* (1 Sprague, 284), in deciding that a Massachusetts statute created no lien for refusing pilotage where it gave half fees, states, as a reason, "that there was neither any actual service or *contract for service made*." That had there been a contract, express or implied, a lien would have resulted, is decided in *The America* (1 Low. 176). The law was amended so as to give a lien, and the objection was made that to enforce such a statutory right where there was no actual service to the ship there was no jurisdiction in the admiralty. Judge Lowell, after arguing that from such a law a contract would be raised by implication, says, "a lien is implied from a contract of pilotage, unless the statute expressly, or by implication, forbids it." If there is a contract for service, and it is refused where labor has been expended to tender it, that a proceeding *in rem* is given, is assumed as undoubted law. Benedict, Conkling, Abbott, and Parsons, citing portions of the foregoing and following decisions, all so lay down the rule. The latter, (1 Adm. 173), says: "Every contract by the master within the scope of his authority binds the ship to its fulfillment." In *The Buccleugh* (3 W. Rob. 222), Dr. Lushington quotes and approves what he says in *The Druid* (1 W. Rob. 391). After saying that generally no suit could be maintained against the ship, unless, at the time of the contract or occurrence, owners were also responsible, he adds (p. 399): "The liability of the ship and the responsibility of the owner in such cases are convertible terms. The ship is not liable if the owners are not responsible, and no responsibility can attach upon the owners if the ship is exempt and not liable to be proceeded against." This was said

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originally in a case for a willful wrong by a master where the owners were not liable and the ship discharged. But it was quoted in *The Buccleugh* as applicable to that class of contracts for which the master as such may bind his owners. We quote the passage as it stands, and concede it is true so far only as it asserts that where the master has a right by the maritime law to bind the owners, he may by his contracts hypothecate the ship. Here in the case of domestic vessels, as the law just now stands, there is an exception as to supplies. But all concede it to be an anomaly in view of the sources from which our admiralty must draw the larger portion of its powers. It does not affect the general rule upon which we rely. In *The Susan* (1 Sprague, 499), Judge Sprague says, that if a signal is given, and persons go out to render assistance with great pains to the ship, their services cannot be rejected as unnecessary, and that if the ship comes to a place of safety without their aid, a remedy *in rem* should be given. He concedes that if the agreement is for absolute payment this will displace the salvage compensation, but it is clear he would still afford the remedy *in rem*. If the implied contract to accept services deduced from a signal will sustain the lien, surely the formal one in this case will. *The Undaunted* (Lush. 90), is a case where at request of a ship a tug went for two anchors, but before they arrived the ship was gone. A libel *in rem* was sustained. After pointing out the difference between the cases of pure salvage, where volunteers labor in the expectation of large rewards and run the risk of success, it is said, "But if men are engaged by a ship in distress, whether generally or particularly, they are to be paid according to their efforts, even though the labor may not prove beneficial to the vessel." Here was a *contract*. Before the instrumentalities for assistance reached the ship she had gone. The case is that before the Court. In *The Circassian* (1 Ben. 209), a libel was sustained for unloading a ship on fire. The cases which deny the jurisdiction in favor of stevedores are justly disapproved, but the case is distinguished from them. It rests upon the principle announced in 11 Wall., that where the contract was decided to be maritime, it was a duty

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to take jurisdiction, and that all the remedies were open both *in personam* and *in rem*. Benedict's Admiralty Pr. says, stevedores may sue *in rem*, and we think he is right. (*The Ocean*, 2 W. Rob. 92). By request, the libellants took a *message* for a steamer. They did personally board the *Ocean* to receive it, but this fact is noticed in judgment only to enhance the compensation, as it was hazardous. It is another case of remedy *in rem* for services not upon or in contact with the ship, and one which for recompense did not depend upon the salvation of the vessel (*The Canada*, Bee's Ad. 90). It is manifestly assumed in the judgment that simply lying by or consorting with another ship, if by contract, will sustain the libel (*The Underwriter*, 4 Blatch. 94). Judge Nelson allowed the *Delaware*, in a proceeding *in rem*, a large extra compensation for lying by, although she could not reach or in any way aid the *Underwriter*. It was, however, upon request. There was a contract. Such feature, it will be seen, attends all the cases where allowances have been made where no actual benefit has accrued or labor upon the vessel has been done. There are a few instances where, in the encouragement of diligence, the expenses of *volunteers* have been paid by proceedings *in rem*, where unexpectedly aid becomes necessary or the attempt abortive. (See, fully so deciding, *The Ranger*, 9 Jur. 119; 2 Par. Admiralty, 284; *The Albion*, 3 Haggard, 254.) Even the old time-honored maxim that "salvage never results from an attempt, but from rescue only," is no longer a universality. If Providence does what the fearless and active salvor attempted, the rule has been modified. It is only where the calamity destroys the object of the effort that all remedy is denied. We look in vain into any department of the rational and protective maritime code for a principle or a precedent which will deny a remedy to the owner, who in good faith and in reliance upon formal contracts incurs expense in order to tender the labor he has agreed to perform.

This jurisdiction is all the more necessary now that so large a portion of our transportation is done by corporations whose ships are frequently covered by bonds and mortgages, and

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whose personal responsibility is doubtful. To send the proposed shipper in all instances to the often distant home of the owner is a hardship which the rule was established to prevent, and which no evil growing out of its administration demands. No class of contracts require promptness so much as those connected with commerce. The buyers of produce, the merchant and manufacturer all have adjusted their most continuous and common transactions upon a basis which involves the utmost fidelity and regularity in the carrying trade. The proprietor of a tug, which in virtue of a fair contract is sent hundreds of miles to aid a ship in distress, should not be compelled to go to another State and sue without security for the agreed price, because the accidents of the winds and waves may have rendered its labors unnecessary.

Decree for libellant.

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APRIL, 1873.

COLLISION.—RESPONSIBILITY OF VESSEL AT REST EXHIBITING COLORED LIGHTS.—LOOKOUT.—DUTY OF MASTER AS TO LIGHTS.—ANNOUNCEMENT BY LOOKOUT.—DUTY TO REANNOUNCE LIGHTS.

A tug lying in the open lake, waiting for a tow, and exhibiting colored lights, is held to the responsibility of a steamer under way.

Where a steamer in the open sea, at rest directly in the path of a sailing vessel, exhibited colored lights, as if she were under way, and the latter was guilty of no negligence in not discovering the false indication of the lights in time to avoid a collision, she was held faultless in keeping her course, although the steamer was sunk by the collision.

When a light has once been announced to the officer in charge of a vessel

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obliged, under the rules, to keep her course, and he has carefully observed its character, bearing, and course, and all apparent conditions indicate absolute safety if the law is complied with, he may leave the future watching of such a light to an experienced lookout, in confidence that the vessel bearing it will be guilty of no gross negligence. Especially may he return to his other necessary duties midships.

If any circumstances suggest danger, or a departure from the ordinary rules by the other vessel, then the duty of greater watchfulness is imposed upon the master, and he would not be authorized to leave to an unassisted lookout the duty of determining when a reannouncement of the light was necessary.

If, in these circumstances, the duty of watching a light has been fairly performed, the Court should not severely criticise the best exercise of an officer's judgment, although believed to be erroneous. Especially should it not be deemed a *fault* when the conduct of the other ship has been gross and unwarrantable.

Where the libellant has been guilty of gross fault, and that of the respondent is in any degree doubtful, a decree for division of damages should not be rendered.

It is not the duty of a lookout to reannounce a light, unless some new conditions occur which an intelligent officer of the deck would not anticipate, and in reference to which some new order would be given. In this case, the continuous bearing of the tug, which indicated her to be at rest instead of under way, did not present such conditions as the fact was common, and did not suggest the slightest danger or difficulty.

Where the original libel set up a grossly false case, and an attempt has been made to support it by inherently incredible proof, although an amendment has been allowed in the Court below, alleging a right of recovery upon wholly different grounds, these facts may rightly be looked to on appeal, in denying relief by a division of damages, in favor of a libellant who thus concealed his own wrong, and sought a recovery in full from the respondent.

LIBEL and cross libel for collision.

The collision occurred on Lake Huron, some five or six miles from, and a little above the port of Lexington, in the State of Michigan, at about three o'clock in the morning of the 14th day of June, 1869. The night was clear, and although it was not yet daylight, the morning had dawned, and a vessel could be seen from one and a half to two miles distant. The wind was southwest. The tug was then, and for several hours previously had been waiting for a tow. She had her bright and colored lights burning; and although her steam was up, her machinery was not in motion, and she was lying entirely still, except that she was drifting before the wind in a northeasterly

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direction, at the rate of from one to two miles per hour. At the time of the collision she was heading eastwardly, or as some of the witnesses say, east by north half north.

The bark was on a voyage from Erie to Chicago with a cargo of coal, and at the time of the collision was, and for some time previously had been sailing on a course north half west. She had all sails set, and was moving through the water at the rate of about nine miles per hour. The bark struck the tug while the latter was lying as above described, hitting her just forward of the pilot-house, at about right angles, or perhaps angling a very little forward, crushing in her timbers, and causing her to sink in about 15 minutes.

The fault charged in the libel against the bark was, a sudden change of course when in dangerous proximity to the tug, thereby causing the collision.

The defense set up by the answer for the bark, and the faults charged against the tug by the answer and cross libel, were :

1. The change of course alleged against the bark is denied.

2. It is denied that the tug's officers and men were properly stationed and attentive to their duties, and the contrary is charged.

3. It is charged that the tug lay where she did, directly in the path of vessels, without proper lights, with no lookout or officer on deck, a mere obstruction to navigation.

4. "That, about 3 o'clock, the bark, heading as above, with all sail set, was proceeding on her course a few miles off Lexington, in the usual frequented track of vessels; a bright and green light was discovered a little over the port bow, indicating a steamboat standing to the eastward; that said bark was kept steadily on her course until a collision was inevitable, when the helm of the bark was ordered hard up, to ease the blow, if possible, but before said order could take effect the bark and tug collided."

The evidence showed that the lights of the tug were seen

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from the bark, as above stated, when one and a half to two miles distant.

Upon the trial it was claimed by the respondent that the allegation of the libel, with regard to a change of course on the part of the bark, was not sustained by a preponderance of testimony; but it was insisted by libellant that, even if this were so, she had been guilty of other faults contributing to the collision; and permission was given to amend the libel by inserting the following averment:

"That said tug was then lying motionless upon the water, and out of the track of vessels going up and down the lake; that, as your libellant is informed and believes, no proper lookout was kept upon the said bark; and that the said collision was occasioned by the failure of the officers and crew of said bark to see said tug, to discover that she was not in motion, and to take steps to avoid her."

The following opinion was delivered by the District Court:

The only fault attributed to the bark by the original libel, viz., a change of course, is not sustained by the proofs, but on the contrary it clearly appears that the bark kept her course without any variation up to the moment of collision. If the trial had been confined to this one allegation of fault, the libel should clearly be dismissed. But such is not the case. A large portion of the testimony, admitted without objection, relates to other questions of fault on the part of the bark, and of excuse on the part of the tug, than those set up in the libel, and the case was really tried and submitted upon those other questions. I had no doubt the case had been as fully and fairly tried, and could be as satisfactorily disposed of as it could be if the original libel were dismissed and a new one filed, covering the case more fully as made by the testimony. The Court, therefore, in the exercise of that broad discretion possessed by it, allowed the libel to be amended, and will dispose of the case upon the merits as really presented and submitted at the hearing (12 Wall. 167).

It is clear to my mind that gross faults are attributable to both vessels.

First. As to the tug. The tug, showing as she did, the lights of a steam vessel in motion, must be held to the respon-

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sibilities and duties of such vessel. By article 15 of the Collision Act of 1864, it was the duty of the tug to keep out of the way of the bark, provided the bark kept her course, as was her duty under article 18. The bark, as we have seen, did keep her course. Therefore, the tug is clearly in fault in not keeping out of the way of the bark, unless the excuses set up for her, or some of them, are tenable.

The excuses set up. It is contended on behalf of the tug, that she had a right to lie where she was lying, in wait for a tow, and that it was customary for tugs to do so. The tug undoubtedly had the right claimed; but while exercising that right she had no right to exhibit the lights of a steam vessel in motion, and thereby mislead other vessels as to her status and intentions. If she would exercise that right in the night time in such a manner as to exempt herself from the duty imposed by article 15, she must do so at anchor, and with her anchor light up.

It is also contended on behalf of the tug that some portions of her engine or machinery were partially disabled, in consequence of which she could not get under motion readily when lying still. This excuse is clearly untenable, because, first, it appears that no effort whatever was made to put her in motion; and, second, it does not appear but that there had been ample opportunity for repairs since the disability was known to exist.

The tug, then, was clearly in fault in not keeping out of the way of the bark.

Second. As to the bark. The duty of a steam vessel to keep out of the way of a sailing vessel, and of the latter to keep her course, does not excuse the sailing vessel from the observance of ordinary care in her navigation, nor from the use of such means as may lie in her power to avoid a collision in case of immediate danger, even though that danger may have been made imminent by a non-observance of duty on the part of the steam vessel. Such I understand to be the effect of article 19, which is as follows: "In obeying and construing these rules, due regard must be had to all dangers of navigation, and due regard must also be had to any special circumstances which may exist in any particular case rendering a departure from the above rules necessary in order to avoid immediate danger." That is to say, these rules are made expressly for *preventing* collisions. Now, if under "any special circumstances which may exist in any particular case," it is necessary to depart from these rules in order to accomplish the very ob-

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ject the rules are intended to accomplish, then it is just as much the duty of a vessel to depart from the rules, as it is under other circumstances to adhere to them. It will not do to say that because one vessel shall fail to do its duty, the other is thereby licensed to run her down and destroy her when such a result may be avoided by the exercise of ordinary care and precaution. And yet in order to exonerate the Sunnyside from blame in this case we must adopt that theory.

The bright and green lights of the tug were seen and reported by the lookout on the Sunnyside when one and a half to two miles distant. The lights were seen a little over the port bow of the bark, and clearly indicated a steam vessel headed to the eastward and across the bows of the bark. When the tug's lights were reported by the lookout, the mate then in charge of the navigation of the bark came forward and looked at the tug's lights, and said to the lookout he "supposed it was a steamer, and guessed she would take care of herself." The mate then went aft to watch some lights there were to leeward, and paid no further attention to the tug's lights; and from this time the tug's lights were not reported, nor was any watch kept, or any notice whatever taken of them on board the bark until the lookout saw the tug right under the bows of the bark, and a collision was inevitable. Ordinary care and precaution require that when a light is once seen in circumstances to involve risk of collision, close watch must be kept of such light until it is safely passed. (See article 20, Collision Act of April 29, 1864; 1 Pars. on Ship. & Adm. 595, note 3; *The Gray Eagle*, 9 Wall. 505; *The Havre*, 1 Ben. 295, 303-306; *The Maria Martin*, 12 Wall. 31, 47.)

The lights of the tug, as we have seen, were made from the bark when from one and a half to two miles distant. The bark was moving through the water at the rate of nine miles per hour, at which rate she must have been from ten to fourteen minutes reaching the tug after her lights were first seen from the bark. There could have been no difficulty, by the exercise of the commonest care and precaution on board the bark, in determining that the tug was not in motion, but was slowly drifting right up into the course of the bark, where a collision must be inevitable unless the bark herself did something to avoid it. Neither was there any difficulty in the way of the bark avoiding a collision, and if ordinary care and precaution had been exercised, she would no doubt have done so. Because that care and precaution were not exercised, the presumption is that the bark was in fault, and that such fault contributed

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to the collision ; and, such presumption not being rebutted, she must stand her fair proportion of the loss occasioned by it (13 How. 108 ; 13 Wall. 475, 478).

The tug and the bark were therefore both in fault, and the damages sustained by both on account of the collision must be equally divided between them.

Decree dividing damages.

From this decree an appeal was taken by the owner of the bark.

Messrs. *H. B. Brown* and *W. A. Moore*, for the libellant and appellee.

The evidence clearly shows that the lookout upon the bark, after making the tug's light at a distance of $1\frac{1}{2}$ miles and nearly dead ahead, turned to look for other lights, and paid no further attention to the tug until he saw her directly under his jib-boom. It is hardly necessary to cite authorities to the proposition that the want of a proper lookout is a fault of the grossest description, and in case of doubt, every presumption is in favor of the proposition that it contributed to the collision. From the multitude of cases, the following are cited : 1 Pars. on Ship. 577 ; *The Wings of the Morning* (5 Blatch. 15) ; *The Emily* (Olcott, 132) ; *The Blossom* (Ibid. 189) ; *Goslee v. Shute* (18 How. 463) ; *Whitridge v. Dill* (23 How. 448).

There must not only be a proper lookout, but he must actually perform his duty (*The John Fraser*, 21 How. 184, 195 ; *The Vianna*, 1 Pars. on Ship. 577, note ; *The Genesee Chief*, 12 How. 443).

Though a sailing vessel, meeting a steamer, is bound, in general, to keep her course, she has not necessarily discharged her whole duty by so doing. She is bound to watch a steamer's lights as much as those of a sailing vessel, and to prevent a collision if she can. The tug may be disabled or unable to move, and still not in fault for exhibiting colored lights (*The Esk*, Law Rep. 2 Ad. & Ec. 350 ; *The Geo. Arkle*, Lush. 382),

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a white light being proper only when a vessel is actually holden by her anchor. She may be in actual violation of a rule of navigation in not keeping out of the way, but, certainly, that does not authorize a sailing vessel to run her down. Other "special circumstances" may exist, requiring a departure from the general rule, and under article 19 of the sailing rules, the vessel is bound to provide against such emergencies. By article 20, nothing can exonerate for "the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case" (1 Pars. on Ship. 580, 595; *The Hope*, 1 W. Rob. 157; *The C. C. Vanderbilt*, Abb. Adm'y, 361; *The New Champion*, Ibid. 202; *The New Jersey*, Olcott, 415).

It is evident if the lookout had watched the tug's light carefully, he would quickly have discovered she was at rest; as her motion, if she had been moving, would have been directly across his course; and this he admits—it would then have been his duty to call the mate's attention to the fact, and that of the mate to hail her or otherwise attract her notice, and failing to do this, to starboard his helm a point and pass under her stern after he had approached so near that it had become apparent that an immediate change must be made to avoid a collision. He would have no right then to assume that the tug would back to get out of his way.

The position taken by claimant is based upon the theory that a sailing vessel encountering a steamer, has but a single duty to perform, and that she may dash blindly on her course, treating the steamer, what she is averred in the cross-libel in this case to be, a simple "obstruction to navigation."

There are three cases which cover this completely: *The A. Denike* (reported in 1 Pars. on Ship. 595, note 3, U. S. Circuit Ct., Mass.), where the similarity is positively striking: even the same expression was used by the pilot; *The Gray Eagle* (9 Wall. 505), where the proposition is distinctly laid down that it is the duty of a lookout to watch a light until all danger is past; that because a white light *usually* indicates a vessel at anchor, it need not always do so, and that the fault

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of one vessel does not authorize another to run recklessly over her. *The Havre* (1 Ben. 295), where the same proposition was substantially repeated. See, especially, remarks of Court on page 303.

See, also, *The Wings of the Morning* (5 Blatch. 15; *The Ariadne* (13 Wall. 475). In the case of *The Hope* (1 W. Rob. 157), it was held, by the High Court of Admiralty, that no vessel shall unnecessarily incur the probability of a collision by a pertinacious adherence to the strict rules of navigation.

In the following cases it was held that the fact that one vessel is in fault will not justify another in the infliction of an injury which could have been avoided by the observance of proper skill and care: *Mills v. The Nathaniel Holmes* (1 Bond, 352; *Western Ins. Co. v. The Goody Friends* (1 Bond, 459).

The rule is equally well settled in the common-law courts, that a party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it if he does not himself use common and ordinary caution. The fact that a person is riding on the wrong side of the road will not authorize another to ride against him (*Butterfield v. Forrester*, 11 East, 60; *Bridge v. Grand Junction R. Co.* 3 M. & W. 245; *Gough v. Bryan*, 2 M. & W. 770; *Monroe v. Leach*, 7 Met. 274; *Farwell v. Boston & Wor. R. R. Co.* 4 Met. 49; Angell on Highways, sec. 345; Sherman & Redfield on Negligence, sec. 33, note 2).

We cheerfully accede to the doctrine that where a fault is proven it will be presumed to be the cause of the collision, but insist it has no application where a contributory fault is clearly shown (1 Pars. on Ship. 580, 595; *Williamson v. Barret*, 13 How. 101).

Messrs. *F. H. Canfield* and *G. V. N. Lothrop*, for the claimant and cross-libellant.

No case can be found where a sailing vessel has kept her

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course and been condemned for a collision with a steamer, where the latter exhibited the lights of a vessel in motion. The allegation of a change of course on the part of the bark, was not insisted upon at the argument.

The tug was at rest while displaying the signal lights of a vessel in motion, and the presumption is that this contributed to the collision (*Waring v. Clark*, 5 How. 465; *The Esk*, Law Rep. 2 Ad. & Ec. 350; *The Continental*, 8 Blatch. 3; *Taylor v. Harwood*, Taney, 444; *The Scotia*, 7 Blatch. 308).

By lying practically at anchor in the pathway of vessels, exhibiting the lights of a steamer under way, yet making no effort to avoid the bark which she had deceived as to her true character and condition, she was guilty of a positive and willful violation of law. All doubts should be resolved against her. The rules prescribed by the collision act should be rigorously enforced (*St. John v. Paine*, 10 How. 557; *Crocket v. Newton*, 18 How. 583; *Steamship Co. v. Rumball*, 21 How. 385; *The Carroll*, 8 Wall. 305; *The Johnson*, 9 Wall. 146; *The Fannie*, 11 Wall. 238).

It was the duty of the bark to keep her course. The tug had the right to lie still till there was danger of collision, and it is conceded that up to this time the bark was not in fault for keeping her course. But it is only *at this point* that the rules themselves apply. They require the bark, after there is probability of collision, to keep her course. Had she failed to do so she would have been a wrong-doer (*The Potomac*, 8 Wall. 592; *Bentley v. Coyne*, 4 Wall. 512; *Baker v. City of New York*, 1 Cliff. 81; *Wakefield v. The Governor*, 1 Cliff. 96; *Haney v. Louisiana*, Taney, 602; *The Corsica*, 6 Blatch. 190; s. c. 9 Wall. 630; *The William Young*, Olcott, 41; *The Oregon v. Rocca*, 18 How. 572; *Crocket v. Newton*, Ibid. 581; *The Northern Indiana*, 3 Blatch. 99; *The Clement*, 2 Curtis, 368; *The R. B. Forbes*, 1 Sprague, 328; *The Metropolis*, 7 Blatch. 214; *The Test*, 5 Notes of Cases, 276; *The George*, 2 W. Rob. 386; *The Vivid*, 7 Ib. 127; *The Superior*, 6 Notes of Cases, 607.

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There was no want of a proper lookout upon the bark. He was an experienced sailor properly stationed. He reported the light to the officer, who came forward and looked at it. A proper construction of his testimony shows that it is not true, as argued, that he paid no further attention to the light till the collision was inevitable. He says the bark kept straight on her course, and he saw no change in the tug's lights; and at the time of the collision he saw the same lights he had seen from the first. But even if the lookout was insufficient, it did not contribute to the collision, as it would still have been the duty of the bark to keep her course (*The Fannie*, 11 Wall. 238; *The Europa*, 2 E. L. & E. 557; *The City of Paris*, 1 Ben. 174; *The Hansa*, 7 Blatch. 288).

The libellant fails to show that the officers of the bark could have ascertained by the exercise of ordinary care that the tug would not get out of the way, and that a change of course was necessary. They had a right to presume the tug would obey the law, and not violate it (*Williamson v. Barret*, 13 How. 101; *The Clement*, 2 Curtis, 368). If there are any doubts they must be resolved against the tug (*Wheeler v. The Eastern State*, 2 Curtis, 144; *Strout v. Foster*, 1 How. 89; *Halderman v. Beckwith*, 4 M'Lean, 292; *Delaware v. Osprey*, 2 Wall. C. C. 268; *The Ariadne*, 7 Blatch. 213; *The Test*, 5 Notes of Cases, 276; *The Grace Girdler*, 7 Wall. 203).

Admitting the bark might have been managed more wisely, her master was guilty only of an *error* in judgment, not of a *fault* (*The Delaware v. Osprey*, 2 Wall. C. C. 268; *The Genesee Chief*, 12 How. 268; *The Scotia*, 7 Blatch. 308; *The Grace Girdler*, 7 Wall. 203; *The City of Paris*, 9 Wall. 638; *The Carroll*, 8 Wall. 305; *The Favorita*, 8 Blatch. 539).

The tug having been guilty of such gross fault, is not entitled to recover, even though the bark was not managed with all that care which the law requires (*The Wm. Young*, Olcott, 41; *The Catherine*, 2 Hagg. 145; *The Fashion*, Newb. 8).

The tug, having been guilty of a positive violation of law, all doubts are to be resolved against her, and the burden is upon her to show that the accident would have happened if

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she had performed her duty (*The Pennsylvania*, 9 Blatch. 454; *The Comet*, Ibid. 323; *The Continental*, 8 Ibid. 3; *The Favorita*, Ibid. 539; *Taylor v. Harwood*, Taney, 444; *Saltonstall v. Stockton*, Taney, 21; *The Ariadne*, 13 Wall. 479).

The cases of *The A. Denike* and *Gray Eagle* are the only ones which tend to support the theory of the tug.

EMMONS, J. The tug Goodnow was lying for a tow in Lake Huron, in the vicinity of the head of St. Clair river, in conformity with a *well known usage*. It was about 3 A. M., and although still dark, her hull could be seen in time to avoid her, had it been known she was without a lookout, and would not herself discover approaching ships, so as to perform her duty and move out of the way. All her lights were brightly burning, with steam up, ready at any moment to move. A great number of vessels were in the vicinity. She was drifting before the wind, about two miles an hour, with her head to the eastward, so as to display to the Sunnyside, which was approaching from the southward, her white and green lights. These were seen by the latter nearly ahead, but, we infer, somewhat over the larboard bow, long before the collision, and, by the experienced lookout, announced to the master in charge. He came forward, observed them, and remarked they were on a steamer, and that she "*was all right*." He soon went further aft, to his more common station midships, where he could walk from side to side, in the observance of other lights, and where he could from time to time approach the compass, and issue orders at the wheel. The Sunnyside's speed was about nine miles an hour. The lookout observed the continuous bearing of the tug, which indicated she was not under way, and lay nearly in his path. It was not until they approached the immediate vicinity of the tug that the lookout, having had his attention turned in other directions by different lights discovered that they were in dangerous proximity. He then hastily announced the fact to the master. The latter at once gave orders to starboard, but too late to avoid the disaster which sank the tug. Upon these facts it is claimed the bark

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was to blame for not starboarding earlier. With some doubt, and after much hesitation, we hold the Sunnyside to be without fault, believing that, in the circumstances, she was warranted in keeping her course.

In arriving at this conclusion, we are in some degree influenced by the wholly inexcusable and exceptionally gross character of the Goodnow's fault. The nature of the original libel and the untruthful and now abandoned proof to support it, we hold as legitimate subjects of consideration in denying a remedy.

In order to appreciate the character of the misrepresentation in the original libel and proofs, it must be borne in mind that it is now conceded the Sunnyside was at no time over the tug's quarter, or in any direction where by any possibility she could be supposed to be there.

Without attempting literal accuracy, substantially the original libel alleged that, while the tug was lying as already indicated, the Sunnyside was made over their *starboard quarter*, and so far *astern* that there would have been a broad berth between them, as she passed, of nearly half a mile. That, instead of keeping her course under the rule, she suddenly ported and ran down the Goodnow. No confession of fault was made; but a case stated, having in no one of its features the most distant resemblance to the facts as they are now conceded at the bar, and contained in the amended libel. The owner of the tug was on board, and the libel necessarily framed from his and his officers' statements. This false case was sought to be supported by testimony so inherently absurd and so undeniably untrue, that it is unworthy of criticism. In all this there is much which, unexplained, is so highly unconscientious as to merit censure, and essentially affect the right to relief (*The Mabey and Cooper*, 14 Wall. 205). No question as to the circumstances in which the amendment was made has been raised here.

That no person on board the tug saw the lights of the Sunnyside until just as the collision occurred, is conceded. If they did see them, their fault is only the more extraordinary. The

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amended libel charges four faults upon the bark: that she had not a proper lookout; that she did not see the tug; that she did not perceive that the tug was not in motion. These imputations are conclusively negatived by the testimony. The fourth is a vague generality, giving no enlightenment to respondent, and is such as we would, upon exception, hold not to be the subject of proof.

The officer in charge having once observed the light, had full authority to act upon the assumption that the steamer would avoid him. We hold, if a light is announced to the officer in charge of a vessel, obliged under the rules to keep her course, and from full observation, the unambiguous apparent conditions in reference to wind, atmosphere, course, distance and character of the vessel, all indicate absolute safety if the law of the road is complied with, he may leave the future watching of *such* a light to an experienced lookout. It will not be a *fault* that he does not himself remain with the latter and participate in his observation. He may return to his post further aft, to his general duties in the ship, and especially, if other lights are off abeam and over the quarters, give his attention to them, and in all cases frequently to his compass and his own course.

The application of the principle to ships whose duty it is to avoid others, requires only a more close criticism of the circumstances, and more frequently demands longer and continuous observation by the master.

If, from such observation, any circumstances known, or which with ordinary diligence might be known, indicate a departure from the rules by the approaching ship, or would suggest danger of collision, from any cause, to an intelligent seaman, the duty of careful and continuous watchfulness is imposed upon the master. He would have no right in such a case to leave to the lookout the difficult duty of deciding when, on account of increasing hazard, he should again announce the light. When, in these latter circumstances, the officer has exercised his best judgment, and kept his course, or, waiting until the peril was great, has departed from the general rule, the Court

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should not reverse his judgment, unless the error has been gross and unpardonable.

It is not the duty of a lookout to reannounce a light, unless some new conditions occur, which an intelligent officer of the deck would not anticipate, from the first observation made, and in reference to which it is in some degree probable a new order would be given.

These general principles, we think, will receive a ready common assent. We apply them here as follows: That the master performed his duty by remaining aft, where he could not see the danger, we have already sufficiently said. We think it equally clear that the lookout did his. An unnecessary argument was made to show that he might, from her continuous bearing, perceive that the tug was at rest. This seaman frankly swears he did so perceive it, and the fact is too apparent for discussion. But it indicated nothing in the least unusual, and imposed no duty upon the lookout of reannouncement. Certainly when not at a distance, because the custom is as common as the trips of the sail craft for which they lay in wait. Nor was a near approach with the same condition any more alarming. It is a common practice for these vessels to wait before they move for the close proximity of those which approach them. As a class, they are small vessels, with powerful engines, and are both started and backed with the utmost rapidity. From the nature of their avocations they acquire an extraordinary dexterity in avoiding vessels close aboard, and consequently, beyond all others, risk nearness of approach. If this one had not the characteristics of her class, it but adds another reason why assuming their attitude and proclaiming that she had, relief should be denied. Out of many thousands of instances where similar vessels have lain in the same way, not one in the whole history of navigation is known to have failed in the performance of her duty. The lookout had a right to repose, therefore, not only upon the statutes of the country, but upon the peculiar power and long practice of this class of ships to perform in just their circumstances the duty which they impose. It was in the night, when no eye can measure the

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distance to a light, or the hull of a ship of unknown size, so as to discover the difference between two, four and six hundred feet. The tug was already moving two miles an hour before the wind. The bark was going nine, with her bows alternately elevated and depressed, and swayed to the right and left as she rose and fell with the waves. These conditions rendered an immediate discovery of the precise moment when the tug, by a few turns of her wheel, should move slightly ahead or astern, as she should elect, utterly impossible. If life depended upon it, it could not be done. She would have to pass several times the distance necessary to avoid the bark before her movement could be perceived by the lookout.

He, too, was engaged in watching for other lights, in entire confidence that this one would move out of his way, and would not, upon the most familiar principles, give it any particular attention. That he would from time to time see it, is certain, because it lay in plain sight before him, and he concedes he did observe its continuous bearing. But it is equally certain, if he was actuated by the motives of ordinary men, he would not, as he states, particularly *notice* it until some new and extraordinary predicaments suggested that it was not likely to obey the laws which so many hundreds before had obeyed in like situations. Add to these conditions the rule of law, that if the bark changed her course at all *in advance* of real danger, she would be condemned for the fault, and we have presented predicaments in which it seems to us little less than a cruel misapplication of rules to hold the vessel liable because the lookout did not decide the precise moment at which he crossed the line of safety. We asked in vain from the learned and experienced counsel in this case a diagram designating in time and distance the point at which the lookout should have renounced the light. None such has been furnished. We apprehend it would be difficult to draw one which would stand the criticism of an expert.

In a case where the fault of the libellant is excessively gross, where the bark has kept her course in accordance with the law, where her officers and lookout are proved to be of the

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very highest character, and where, to say the least, their conduct has been all which in ninety-nine cases in the hundred can be secured, we should deem it most impolitic for the safety of navigation, a discouragement to the performance of duty by good seamen, to set up in Court, for the benefit of those who have outrageously violated the law, a rule of criticism which would condemn the respondents' ship. In exceptional circumstances, and under the stimulus of apprehended danger, "sleepless vigilance," rightfully in such circumstances demanded, is possible. With our present faculties it cannot be long sustained, nor do the ordinary exigencies of commerce demand it. When the facts presented not only fail to excite suspicion of peril, but, where viewed in connection with legal rules, authorize entire confidence that all is safe, *ordinary care* is all which can be continuously exercised, and all which the law requires.

We would like to have grouped the decisions which sustain more pointedly the various propositions involved in the preceding disposition of this case. Again compelled to work in an unusual mode from failing sight, and with many undecided cases demanding attention, we can do no better than to refer to judgments in the order in which they have been examined. In our selections we can go but little beyond the exceptionally full and thorough briefs of counsel.

The following cases show our judgment would be sanctioned by the English Admiralty Courts: *The Test* (5 Notes of Cases, 276). Dr. Lushington says: "I cannot conceive that anything would be more likely to lead to mischievous consequences than to suppose that a vessel, whose duty it is to keep her course, should anticipate that another vessel will not give way, and so give way herself. The consequences would be that there would be no certainty. The certainty which results from adhesion to general rules is, in my opinion, absolutely essential to the safety of navigation." *The George* (5 Notes of Cases 371). This is emphatically repeated by the same judge. *The Superior* (6 Notes of Cases 607). He says the proof must be entirely clear, showing the necessity for the deviation, before it can be even

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justified. It is a different thing to hold that a neglect to do so is a *fault*. And see, equally pointed, a case quite beyond the requirements of the Sunnyside, *The Vivid* (7 Notes of Cases 127); *The Immaganda Sara Clasina* (7 Notes of Cases 582). A vessel, whose duty it was to keep her course, did not deviate until she had twice hailed the other, and at last, in alarm, did so, and was condemned in the entire damage. It is an extreme case, and goes far beyond what it is needful now to argue. We would hold the master blameless if the approaching ship neglects his duty so long as to produce alarm in an experienced sailor. And see a more recent enforcement of the same rule, *The Gitana and Esk* (Law Rep. 2 Adm. 350). The *Esk's* light indicated her at anchor. *Minute* observations *might* have discovered she was in motion, but the *Gitana* was held faultless for full reliance on the lights.

The decisions of our own Courts are equally pointed in the same direction.

The Clement (2 Curt. 363). A ship, conceding her own fault, asked a decree for division against another which was entitled to keep her course. It had been plausibly argued, as in this case, that as she approached close to, it was entirely manifest a movement on her part would have prevented the disaster. At page 368, Judge Curtis says: "Upon the rule of navigation applicable to such cases, he was not only in the right in acting upon the assumption that the brig would be so steered as to keep out of his way, but he was *bound* to act on that assumption, and keep his course, unless he saw that there would be no *probable* chance of a collision if he disregarded the rule. *The Ariadne* (7 Blatch. 211). A brig, having an imperfect starboard light, was sunk in the night by a steamer. It was sought to sustain the libel on the ground that by extraordinary vigilance the brig might have been sooner seen. Judge Woodruff, affirming the decree dismissing the libel, at page 213, says: "But vessels have a right to assume that other vessels, if in their neighborhood, are acting in obedience to the statute regulations, and where the negligence of the sailing vessel, and her failure to comply with the statute requiring her to bear a light which

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can be seen at a distance of two miles, have led the steamer into danger of collision, it is not for the sailing vessel to insist that by more than usual vigilance she might nevertheless have been discovered at a few yards' greater distance, and to claim contribution on that ground." This case is reversed in 13 Wall. 475, but upon grounds which do not in the least affect the principle for which we quote it. That Court, taking an entirely different view of the facts, declared the steamer guilty of *gross* fault, that "for all the purpose of the case, there might as well have been *no lookout on the steamer*." The expressions in reference to "sleepless vigilance," are carefully confined to the crowded thoroughfare in which the collision occurred, and were applied to a ship upon whom was *cast the duty of avoidance*. They notice, too, that although the light of the bark was dim, she could have been seen a quarter of a mile, if the lookout had done his duty. The judgment in no way qualifies the rule of law laid down by the circuit and district judges, that the gross fault of a libellant cannot impose exceptional vigilance upon another. This is well-settled law in the Supreme Court. In *The Comet* (9 Blatch. 323), Judge Woodruff says that where a party seeks a recovery after confessing a fault on his part, he must be held to the clearest proof of wrong on the part of his adversary. It is not enough to leave it in doubt. In *Saltonstal v. Stockton* (Taney, 11), Chief Justice Taney lays down the following principle at common law, which is equally applicable in a Court of Admiralty: "If a man unlawfully places another in a situation which compels him to undergo one of two hazards, and forces him to choose upon the instant between them, he necessarily gives him the right of selection, and must be responsible for the consequences, although it may turn out that the most fortunate alternative was not adopted." *The Scotia* (7 Blatch. 308). The Berkshire, with illegal lights, led the Scotia to suppose that it was a steamer, at so great a distance that her colored lights were hid by the convexity of the ocean. She was, in fact, but a few rods off. In a judgment which, on account of the magnitude of the values involved, was the result

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of more than ordinary examination, Judge Woodruff, affirming on appeal what Judge Blatchford had ruled in the District Court, at page 338, said: "It was night, the distance of the Berkshire could not at that instant be known. If the Scotia attempted to go to port, it was not at all improbable that she would meet the ship while in the act of turning, while by turning to starboard there was a like uncertainty. Her officers must choose. They did exercise their judgment in good faith, and yet the collision ensued." Attention is called to the fact that lights, in reality within a few rods, were supposed *four miles* off upon the mast of a steamer whose colored lights were below the line of vision over the water. Here the Sunnyside is asked to decide, within two or three hundred feet, the precise distance of the Goodnow. This case has been affirmed by the Supreme Court, although not yet in the reports. *The William Young* (Olcott, 41). A sailing vessel, in fear of a collision, having changed her course to avoid it, was injured by a steamer. Judge Betts says: "Sailing vessels cannot justify a departing from their course on a probability of encountering an approaching steamer, unless she is crowding so much upon the track as to create *imminent danger of collision*." *The R. B. Forbes* (1 Sprague, 328). The libellant's vessel saw a steamer more than a mile off; she might easily have avoided her by a slight movement, but as it was her duty to keep her course, Judge Sprague decreed for the whole damage, upon the ground that she had a right up to the last moment to suppose the steamer would avoid her. He adds, it would have been a fault for her to have changed her course. *The Corsica* (9 Wall. 630; s. c. 6 Blatch. 190). It was the duty of the America to avoid the Corsica. In attempting to cross her bows at a late period, discovering it was too late to do so, she stopped and backed. The Corsica, in the supposition she was going to carry out the attempt, starboarded. This would have been entirely safe, but for the unexpected backward movement of the America. Although the Corsica was misled into this movement, the District, Circuit, and Supreme Courts all condemned her in the entire damage of thirty-three

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thousand dollars. She did not adhere to the rule and keep her course. *Bentley v. Coyne* (4 Wall. 512). When a vessel, at the last moment, in great peril, altered her course, the Court, in holding it justifiable in the circumstances, prescribes rules clearly showing the Sunnyside was right in holding it, even if it would not have been a fault to do otherwise.

It is in no disregard of the familiar rule that the Admiralty, if it suffers recovery at all, where there is mutual fault, equally divides the damages, that we say that when there is a gross and criminal departure from well-settled rules, and an absence of all common care on the part of the libellant, he should not be entitled to recover, even although he succeeds in proving a slight fault against his adversary. *The Comet* (9 Blatch. 329). Judge Woodruff examined the question of fault on the one side, in the light of that shown upon the other. Numerous judgments pursue the same course. It may, perhaps, resolve itself into the simple truism that the more gross and improbable is the fault, upon the one side, the less is the duty of observation and of its anticipation on the other.

An extraordinary criticism is made in this case. Complaint is made that a lookout on a vessel entitled to keep her course, with a light before him which a seaman of common prudence would take for granted would get out of the way, temporarily took his eyes from it to watch other points of the horizon along which were numerous lights. Wholly unreasonable as is such an objection, when coming from the mouths of those who put them forth to protect themselves from the consequences of their own wrongs, they are nevertheless not novel, and have been frequently answered by judges of the highest character (*The Europa*, Browning & Lushington, 89; 2 E. L. & Eq. 557). The Privy Council, affirming the decision of the High Court of Admiralty, dispose of such a criticism in favor of this bark. The *Charles Bartlett*, being close-hauled, and bound to keep her course, and the steamer which sunk her having been found in fault, it was urged the sail vessel should contribute to the damage, because, among other imputed faults, it was conceded the lookout, just before the collision, had his

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attention attracted from the steamer by turning to observe some workmen engaged in coppering the rail. Their lordships say: "We can pay no attention to that argument; his business as lookout was to walk with his eyes to the horizon, but that does not mean that he is not to turn his eyes off to watch what a man is doing. All these expressions, 'lookout,' are to be taken in the common sense. He might do that, and look after the man coppering the rail." They say, as the bark was entitled to keep her course, the absence of a lookout was less important. Answering the objection that the bark might have heard the steamer sooner, they add: "Now we think, with reference to that, the circumstance that she was *keeping her course* was very important, because a ship keeping her course is only bound to go on and keep her course; not anticipating and watching that other persons are coming. If she had heard something was coming, she would have been entitled to consider that it would come so as not to do her damage." A different rule, of course, would apply when perceived irregularities indicated danger, and especially to a vessel bound to avoid another.

When that high degree of watchfulness necessary only in circumstances of danger, is in argument required of those who are *entitled to their way*, upon the ground that unexpected irregularities may attend the movements of an approaching ship, the appropriate answer is that given by Judge Woodruff in *The Scotia* (7 Blatch. 308), where substantially he says: such a position assumes what is not to be assumed; that irregularities will occur, or that officers, without evidence that they are probable, are bound to presume they will happen. Not in reference to a vessel having a right to keep her course, but to those who are bound to keep out of the way, and where a higher duty is imposed than that demanded of the Sunnyside, the Supreme Court in *The Grace Girdler* (7 Wall. 203), lays down the following reasonable rule: "The highest degree of caution that can be used is not required. It is enough that it is reasonable under the circumstances, such as is usual in similar cases, and has been found by long experience to be suffi-

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cient to answer the end in view, the safety of life and property." The remarks in *Williamson v. Barrett* (13 How. 101) are peculiarly applicable in cases like this. The Supreme Court says it is by no means enough to show that a particular act or movement would prevent a collision, it must further appear it is a legal duty to make it. In ninety-nine cases in a hundred, vessels bound to keep their course might save collision by deviation, but it is not their legal duty or right to do so.

Equally stringent in the application and unambiguous in expressing the rule in manifold applications are, *The Continental* (by Judge Woodruff, 8 Blatch. 3), *The Eastern State* (by Judge Curtis, 2 Curtis, 141), *The Favorita* (8 Blatch. 539), *Taylor v. Harwood* (Taney, 444), *The City of Paris* (9 Wall. 635). In *The City of New York* (1 Cliff. 75), Judge Clifford says: "The vessel whose duty it is to keep her course should do so as if *there were no danger*." And in *The Governor* (1 Cliff. 96) he adds that these suggestions, that a ship bound to keep her way *might* by deviation avoid the collision, are entitled to but little weight. See also, *The Catharine* (2 Hagg. 145), *The Fashion* (Newberry, 8), *The Lyon* (Sprague, 44; 1 Pars. Adm. 529, and cases cited), *The Carroll* (8 Wall. 305), *The Johnson* (9 Wall. 146), *Crockett v. Newton* (18 How. 583), *The Steamship Co. v. Rumball* (21 How. 385). See also *The Free State* (*post*, p. 251), decided by this Court, in which the general principle authorizing full confidence that the rules of navigation will be adhered to is announced, and the leading judgments considered.

A full consideration of the books cited by the libellants is impossible. None of them, save one, purporting to be a correct manuscript report of a decision by Judge Clifford, have any tendency at variance with our judgment. We doubt whether it is fully before us. *The Gray Eagle* (9 Wall. 505) is cited by the libellants. The case bears no analogy to this. The Court say the *Gray Eagle* was grossly in fault for not perceiving that a light which must have crossed from the larboard to the starboard bow, was in motion and not at anchor. The remark that the master should have watched the light, we

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should agree with in the circumstances of that case. *The Scotland* (1 Ben. 295), a vessel whose duty it was to keep out of the way, was guilty of manifest irregularities in such ample time before the collision, that had they been known to the officer on the other ship, *ordinary prudence* would have demanded a deviation. The lookout signally failed to do his duty. The case is but a common illustration of principles we fully concede. With some of the arguments in the opinion, if, as we much doubt, it is intended to sustain the inferences which counsel sought to draw from it, we should not agree. *The C. C. Vanderbilt* (Abb. Adm'y 361), *The Hope* (1 Wm. Rob. 157), are like cases. 1 Pars. Adm. 580, and notes, refers to the leading cases, holding that a rule of navigation should not be stubbornly adhered to. He remarks that *The Oregon* (18 How. 570), *Crockett v. Newton* (18 How. 581), take a somewhat different view. If it is supposed that tribunal has decided a rule of navigation *may* be stubbornly adhered to, we do not so understand them, and certainly proceed in no such notion now. If there be any difference between the English and American rulings upon this subject, the former are more rigid in insisting upon adhesion to rules of navigation.

We think the judgment referred to and the rules best for the safety of navigation, establish the right of the Sunnyside in the circumstances which were presented to her lookout to keep her course up to the point when collision became inevitable. She then did all in her power to avoid it. We find that there was no fault in the master for returning to his post, or in the lookout, standing on the forecastle of his heaving ship, in the night, with no guide object between him and the light, that he did not discover the difference between a movement of two miles an hour and five, or in distance between six hundred feet and two. Carelessness on the part of the libellants, which, if life had been lost was undeniably *criminal*, can cast no such extraordinary duty upon the approaching ship.

Decree for the cross-libellant.

NOTE.—This case is now pending on appeal in the Supreme Court.

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APRIL, 1873.

COLLISION.—STEAMER AND SAILING VESSEL.—CONSTRUCTION OF ARTICLES 13 AND 16.—RISK OF COLLISION.—OBLIGATION TO SLACKEN SPEED.

A propeller descending the Detroit river at her usual speed, made the green light of a scow very nearly dead ahead, and about the same time the red light of a steamer a little upon her port bow; the steamers exchanged single whistles and passed each other to the right; while passing the ascending steamer the propeller starboarded to avoid the scow; when very near the propeller, and about one and a half points on her starboard bow, the scow ported, and threw herself across the propeller's course, and thereby came into collision with her and was sunk. *Held*, the scow was in fault for changing her course, and that the propeller was not in fault for failing to slacken speed before the scow exhibited a red light.

A propeller meeting a sailing vessel in a clear night with plenty of sea room, is under no obligation to slacken speed so long as the sailing vessel is apparently keeping her course, and no danger is apparent.

The words "risk of collision" are not used in the same sense in Articles 13 and 16 of the Collision Act; in the latter they apply only to cases of manifest *danger* of collision, and the obligation to slacken speed under Article 16 was not intended to be contemporaneous with the duty of porting under Article 13.

The cases upon the subject of speed reviewed and criticised.

LIBEL for collision, by August F. Ludwig and others, against the propeller Free State, the Western Transportation Company, claimant.

The collision occurred between three and four o'clock in the morning, on the 17th day of August, 1870, in the Detroit river, just above Amherstburg, in Canada, and between the main land and the head of Bois Blanc Island. The scow was bound up with a load of building stone. The propeller was bound down, also loaded. The weather was fair, and it was a

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good night to see lights. The scow had the wind free, and a little over her port quarter. The propeller struck the scow on the port side, a little forward of the main rigging, crushing her in and causing her to sink almost immediately. The specific faults with which the propeller was charged were five in number, and were as follows: 1. Want of proper lights. 2. No lookout. 3. Did not keep her course and pass on port side. 4. Did not slacken her speed. 5. Not fully equipped. The answer denied the faults charged, and that the collision was caused in any manner by fault or negligence on the part of the propeller, and claimed that the same was caused solely by fault and negligence on the part of the scow, and specified the following: 1. That the scow had no lookout. 2. She did not keep her course. 3. Officers and crew not at their proper posts, &c.

The following opinion was delivered by the District Court (Judge Longyear).

There is no pretense that the first, second, and fifth charges of fault against the propeller, and the first and third against the scow, are sustained by the evidence. The case, therefore, stands for decision on the remaining charges only:

The law governing the case is found in articles 15, 16, and 18, of the Act of April 29, 1864 (13 Stat. 60, 61), as follows:

Article 15. If two ships, one of which is a sailing ship and the other a steamship, are proceeding in such a direction as to involve risk of collision, the steamship shall keep out of the way of the sailing ship.

Article 16. Every steamship, when approaching another ship so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse; and every steamship shall, when in a fog, go at a moderate speed.

Article 18. Where, by the above rules, one of two ships is to keep out of the way, the other shall keep her course, etc.

The mere fact of collision between a steam vessel and a sailing vessel is, as a general rule, *prima facie* evidence of fault and negligence on the part of the steam vessel, it being made her duty, by article 15, to keep out of the sailing vessel's way; provided always, however, that the sailing vessel is herself without fault. In such cases, therefore, unless it shall ap-

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pear that the collision was in fact the result, in whole or in part, of fault on the part of the sailing vessel, the steam vessel must bear the loss. Hence it becomes important, in this case, in the first instance, to inquire into the charge of fault made against the scow.

By article 18, it was the duty of the scow to keep her course, and the charge of fault made against her is that she did not do so.

By the evidence adduced on behalf of the scow the following facts are established: After entering Detroit river, the scow kept up along nearer to the Canadian (her starboard) bank. Just after passing Amherstburg the steamer Jay Cooke passed the scow on her starboard side, or between her and the Canadian bank. As the Jay Cooke was passing her, the scow came up (starboarded) one point, or thereabouts, in order, as the witness said, to give the Jay Cooke more room. After the Jay Cooke had passed, the scow ported, in order to get into the wake of the steamer. It was while she was sailing under this port order that the propeller came down upon her. When the collision became inevitable, the scow's helm was put hard aport, and the collision occurred.

Here, then, by her own showing, were at least two changes in the scow's course. Did these changes, or either of them, occur after it had become the duty of the scow to keep her course? And, if so, did such changes cause, or contribute to, the collision?

I think the proofs show that the propeller had been made from the scow before the Jay Cooke passed; at all events, she was made aware of the approach of the propeller when she and the Jay Cooke exchanged signal whistles, which occurred just as the Jay Cooke was passing the scow, and, of course, before the latter had ported to get into the Jay Cooke's wake. The proofs further show that when the two steamers blew their signal whistles, the propeller and scow were not to exceed a half a mile apart, and were probably considerably nearer than that; and that when the scow ported, the distance between them was only some 300 to 400 feet.

From these facts, it is clear that the proximity of the two vessels was such that the duty of the scow to keep her course had attached before she had made either of the changes mentioned.

Now let us see what effect these changes had in bringing about the collision.

The proofs on the part of the propeller show that the scow

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was first made from the propeller at or about the time the Jay Cooke was passing the scow, and that then the scow showed to the propeller her green or starboard light. This must have been after the scow had starboarded to give the Jay Cooke more room; because, owing to a bend in the river between the two vessels, and their position in the river, the starboarding of the scow would have the effect to shut in her red and open her green light to the propeller. It also appears by the proof that the propeller's course was laid to avoid the scow, while the latter was under the starboard helm, and still showing her green light; and I think the conclusion irresistible that, but for the scow's porting as she did, the propeller would have gone entirely clear of her, and there would have been no collision. The propeller, of course, had the right to pass the scow on either side she chose, and, in laying her course, she had the right to presume the scow would keep her course.

From the above premises two things are apparent:

1. That, if the scow had kept the course she was on when the Jay Cooke overtook her, and had not starboarded as she did (and there is nothing to show that such starboarding was at all necessary to avoid collision with the Jay Cooke), the propeller would not have been misled as to the scow's ultimate intentions, and would have had no excuse for attempting to pass her on her starboard side.

2. If, after the scow had starboarded, she had then kept her course, there would have been no collision, and hence that the immediate cause of the collision was the scow's porting as she did.

In arriving at the above conclusions I have found it unnecessary to resort to that portion of the testimony on the part of the propeller in relation to the situation of the two vessels in the river, and relatively to each other, which was so ably and severely criticised by the learned advocate for the libellant. As to the movements of the scow I have drawn my conclusions solely from the libellant's own testimony, and have resorted to the testimony on the part of the propeller only for the purpose of ascertaining when the scow was first made from the propeller, what light of the scow was then seen, and what action on the part of the propeller was predicated thereon.

Having found that the scow must be held responsible for the immediate cause of the collision, it remains to inquire into the conduct of the propeller, and see if she was guilty of any fault which contributed to the result.

The speed of the propeller, as we have seen, was nine

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miles an hour. Confessedly she did not slacken that speed until the collision was inevitable, and then it did no good. Risk of collision was clearly involved from the time the propeller first made the scow, and therefore her failure to slacken speed was clearly a violation of article 16.

As to when the duty to slacken speed begins in such case, see opinion in *Milwaukee* case, recently decided in this Court (*post*).

Where a vessel thus violates a positive rule of law, and a collision ensues, it will be presumed that such violation of law contributed to the collision, unless the contrary be made clearly to appear. These rules were enacted to prevent the loss of life and destruction of property by collisions upon the water, and the only way to make them effectual is to insist on their rigid enforcement. There being nothing in the case to rebut the presumption above spoken of, the propeller must be held responsible for not slackening her speed as required by article 16.

Considering that it was in the night, or, at best, in the dim twilight of the morning, and in a narrow channel, through which lay the pathway of the entire commerce of the lakes, and consequently thronged with vessels passing and repassing most of the time, both night and day, as it actually was to a considerable extent at the time in question, the speed of the propeller was clearly too great for prudent and safe navigation, so much so as to constitute a fault on general principles, and for which she would be held liable independently of article 16 (*The St. Charles*, 19 How. 108, 111; *Union S. S. Co. v. New York & Virginia S. S. Co.* 24 How. 307; *The Dispatch*, Swab. 138; *The Germania*, 21 L. T. N. S. 44.)

Decree dividing damages.

From this decree an appeal was taken by the claimant to the Circuit Court.

Mr. H. B. Brown, for the claimant and appellant.

The scow was clearly in fault for not keeping her course (Articles 15 and 18). If a sailing vessel keeps her course and a collision ensues, the steamer is, *prima facie*, in fault; but if she does not keep her course, she is in fault, unless she can bring herself within Article 19 (*The Potomac*, 8 Wall. 590; *The City of New York*, 1 Cliff. 75; *The R. B. Forbes*, *Ib.*

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331; *The Wm. Young*, Olcott, 38; *The New Jersey*, Id. 415; *The Neptune*, Id. 483; *Steamship Co. v. Rumball*, 21 How. 372).

The duty of keeping her course involves the incidental duty of *beating* out her tack. She must not embarrass the manœuvres of the steamer by changing her course, unless there is an immediate necessity for so doing (*The Argus*, Olcott, 304; *The Empire State*, 1 Ben. 57; *The Bridgeport*, 6 Blatch. 3; *The Scotia*, 5 Blatch. 227; *The Potomac*, 8 Wall. 590).

Such fault being established, the scow was solely to blame unless she can prove the steamer guilty of a subsequent fault not produced by or in any way attributable to the first (Lowndes on Coll. 88; *The Lion*, 1 Sprague, 40; *The Anglo Norman*, 1 Newb. 492; *The Ariadne*, 2 Ben. 472; *The Miranda*, 1 Newb. 227).

If the scow does not keep her course, she has no right to question the propriety of our order to starboard—the steamer has the right to adopt such measures as she may choose to get out of the way (*The Great Eastern*, Holt, 172; *The Osprey*, 1 Sprague, 245; *The Oregon*, 18 How. 570; *St. John v. Paine*, 10 How. 557; *Newton v. Stebbins*, Id. 586; *The City of New York*, 1 Cliff. 75; *The Carroll*, 1 Ben. 286; *The R. B. Forbes*, 1 Cliff. 331; *The Leopard*, Daveis, 193; *The Northern Indiana*, 16 Law Rep. 433).

The propeller was under no obligation to slacken speed until danger was apparent (*The Jesmond & Earl of Elgin*, L. R. 4 P. C. 1; *The Scotia*, 7 Blatch. 308; *The Queen*, 8 Blatch. 235; *Williamson v. Barrett*, 13 How. 101; *The Ariadne*, 2 Ben. 472).

There are but five exigencies in which the obligation to slacken speed arises, neither of which existed in this case:

(1) When running in a fog, or in hazy or smoky weather (*McCready v. Goldsmith*, 18 How. 89; *The Northern Indiana*, 3 Blatch. 92; *The Colorado*, *post*).

(2) When meeting vessels in a narrow channel or river (*Ward v. The Rossiter*, Newb. 225; *The Bay State*, Abb. Adm. 235; *The Milwaukee*, *post*).

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(3) When entering a crowded harbor or *thicket* of vessels (*The Indiana and Buffalo*, Newb. 115; *Steamboat New York v. Rea*, 18 How. 223; *Rogers v. Steamer St. Charles*, 19 How. 108; *The Louisiana*, 2 Ben. 377; *The Steamer Electra*, 1 Ben. 282; *The City of Paris*, 9 Wall. 634).

(4) When approaching a vessel whose position or movements are uncertain (*Steamer Louisiana v. Fisher*, 21 How. 1; *The Jas. Watt*, 2 W. Rob. 271; *The Birkenhead*, 3 W. Rob. 75; *Nelson v. Leland*, 22 How. 48).

(5) When the approaching vessel does something that indicates a *departure from the rules of navigation*, or a misunderstanding of the signals.

All the cases holding vessels in fault for too great speed fall within one of the above classes. Not one can be found which holds a steamer in fault for maintaining her usual speed when no danger is apparent.

Mr. Geo. B. Hibbard, on the same side.

The District Court erred in finding the propeller in fault for too great speed.

(1) There was no "risk of collision" until the scow committed her fault, and therefore no obligation to slacken speed. Certainly the propeller was not bound to anticipate an infraction of the statute by the scow.

(2) The burden is upon the scow to show that the collision was not owing to her fault in changing her course, and if she cannot establish this, she cannot recover for any injuries she may sustain (*The Lion*, 1 Sprague, 40; *The Bay State*, 3 Blatch. 48; *Waring v. Clarke*, 5 How. 441, 465).

(3) There was no obligation to slacken speed until danger of collision was apparent. "Risk of collision" is *determined* when one vessel changes her course sufficiently to pass clear of the other (*The Earl of Elgin*, L. R. 4 P. C. 1; *The Wenona*, 8 Blatch. 499).

(4) The officer of a steamer has a right to assume that others will obey the rules of navigation, and is bound to assume that a sailing vessel will not change her course.

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(5) There being no fleet of vessels, a speed of nine miles an hour, coming down the river, was not excessive—certainly it was not a fault *as to the scow*.

(6) The scow has no right to commit the fault she did, and then, upon a mere conjecture, call upon the propeller for contribution.

EMMONS, J. The grounds upon which the libellants demand an affirmance of the decree are that the Free State starboarded and ran into the Meisel after the latter had ported and showed her red light, and that the speed of the propeller was, under the circumstances, unlawful.

In reference to the first, the District Court found the facts against the libellant. We agree that the evidence shows the starboarding on the part of the propeller was before or nearly cotemporaneous with the porting of the Meisel, and that such movement on the part of the latter caused the collision. We shall not discuss the evidence upon this point. The facts will be stated only for the purpose of showing the reasons why we differ from the learned judge of the District Court in reference to the application of the rule of law which requires a steamer in difficult navigation, or where, from any cause, there is "risk of collision," to slacken her speed.

The following facts, substantially stated in the opinion of the District Court, are all which are necessary for the purposes of the present judgment.

The Meisel was coming up the river between Malden and Bois Blanc Island, and near the Canadian shore. The propeller Free State, well equipped, manned and lighted, with lookout, and officers well placed, was coming down somewhere near the center of said channel, at full speed. At the same time the steamer Cooke came up between the Meisel and the Canadian shore, and exchanging with the propeller the usual signals for so doing, they passed each other to the right. The Meisel, as the Cooke passed between her and the shore, starboarded, and then, if not before, displayed alone her green, and shut out from the Free State her red light. The wind was over the larboard quarter of the

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Meisel, and she had a clean run before her, in the course which the display of her green light indicated, of over half a mile. No other vessel was in the vicinity, and there was nothing to induce a suspicion on the part of the Free State that she would not run out the course upon which she had just entered, in circumstances rendering such duty imperative. As the Cooke passed the Free State, and while the Meisel was displaying her green light, indicating, as she was actually running, a course to the northwest, directly across that of the Free State, the latter, as was not only her right but her duty, starboarded, in order to pass the Meisel. While the ships were in this position, and in such close proximity as to make a collision inevitable from the movement, the Meisel ported, and displaying her red light to the propeller, ran across her bows, and was sunk so quickly as to result in loss of life. The instant the red light was opened to the Free State, every effort was made to arrest her progress. The morning had so far advanced that vessels could be seen a mile away. The atmosphere was clear, so that lights were in no way obscured. All the conditions of navigation were favorable for safety. It presents but the common case of a descending vessel meeting a ship without a circumstance to excite fear of collision. If the duty of slackening speed exists, it is only because the rule is universally applicable in all circumstances contemplated in Article 13, even though the ships in fair weather meet in the open sea. Such a rule, counsel contend, the District Court administered in this case, and more fully explained and illustrated in the case of *The Milwaukee* (*post*). It is insisted that both judgments, when taken in connection with the facts in this record, construe Articles 13 and 16 of the Act of 1864 as imposing upon all steamships meeting end on, or nearly end on, the duty of both porting and slackening speed contemporaneously. As a necessary result of such a rule, it is agreed a like duty is imposed upon all steamers meeting a sail vessel in circumstances demanding a change of course in order to avoid them. From this construction of the rules and all its consequences in practical navigation we are compelled to dissent. We can discover in the facts as we

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have stated them, no duty on the part of the Free State to slacken her speed, until the unfavorable presentation of the red light of the Meisel immediately under her bows suddenly prompted the attempt. As everything possible in the circumstances was then done, we hold her to be without fault.

So far as the practical administration of this principle is concerned in *The Milwaukee*, we found no fault. In that case, from facts apparent to both masters, the courses were doubtful. It is with the argument, and some of the reasons of the judgment only, which we disagree. In the opinion of the District Court, too, in this cause, we find it said the collision happened in the night, with the channel crowded with vessels. No such facts appear in the record before us, otherwise we should promptly affirm the decree. We think, in the application of this rule, there would be little difference between the District Court and this. The necessity for the present discussion arises from the judicial argument in *The Milwaukee*, its citation in the present case in the opinion below, and its citation by counsel as a precedent here. It, by no means, follows that the learned District Judge gave it any such extension.

Article 13 is as follows: "If two ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other."

Article 16 provides that "every steamship when approaching another ship, so as to involve *risk of collision*, shall slacken her speed, or, if necessary, stop and reverse, and every steamship shall, when in a fog, go at a moderate speed." It is argued that the former provides the helm shall be put to port when vessels are meeting end on, so as to involve risk of collision; and, as Article 16 uses like language in describing the cases when speed shall be slackened, both duties must be performed at the same time.

Literally and irrespective of the former condition of the law, and of the exigencies of navigation, this is a logical con-

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clusion. We think, however, this cannot be the meaning of these rules.

Upon principle we should have no doubt whatever in reference to their meaning. But in view of the history of their adoption by Congress, we should deem the decision of the Privy Council, reversing the judgment of Sir R. Phillimore in *The Jesmond* and *The Earl of Elgin* (L. R. 4 P. C. 1), obligatory.

This Act is but an adoption of the English rules sanctioned by Act of Parliament. They have sprung from much mutual consultation and political conference in both countries, and were intended to create a system common to the commerce of each. All the leading maritime powers of the world have adopted them. Were there much greater doubt than we apprehend exists as to their meaning, we have confidence the Supreme Court would follow for the sake of harmony the decision of the Privy Council. It is at all events the duty of this Court to do so. In that case the *Jesmond* and *Elgin* were meeting end on, and in the night, going at full speed. The former obeyed Article 13, and ported. The *Elgin*, when so near that the movement inevitably produced the collision, starboarded, and was sunk so suddenly as to drown a large portion of her crew. Sir R. Phillimore held that Article 16 imposed the duty of slackening speed at the same time, and in the same circumstances in which Article 13 required the helm to be ported. He divided the damages therefore, upon the ground that the *Jesmond* was running at too great speed. His judgment was reversed upon appeal. There was full argument and consultation with the nautical advisors, and the rule clearly announced that where Article 13 is obeyed, and there is nothing in the known conditions to lead either side to suspect a departure from it by the other, there is no duty to slacken speed, and Article 16 has no application. It is said that article applies only where some known fact, or one which ordinary care might discover, indicates danger. It is with much emphasis said the *risk of collision* mentioned in it does not include those unexpected violations of law by an approach-

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ing ship which a good seaman would not anticipate, in the supposition that there was an experienced master in command.

The following decision, although not cited in the *Elgin*, is a full precedent for the judgment. The condition of the law, when it was decided, was substantially the same as after the statutory adoption of the rules in reference to porting and slackening speed (*The Rob Roy*, 3 W. Rob. 191). The *Rob Roy* ran down the *Unicorn*, going at full speed until she was in such close proximity that the attempt to stop was useless. The green light of the *Unicorn* being extinguished, and the red light hid on account of her course, she was mistaken for a sail craft. The *Rob Roy* ported as she should have done had the vessel been what the light indicated. Dr. Lushington excused the *Rob Roy* for not slowing her speed, because, he says, the lights which the *Unicorn* displayed indicated it was safe not to do so.

The following American decision, made since the adoption of the rules of 1864, is equally pointed (*The Scotia*, 7 Blatch. 308). A sail vessel, in the night, was sunk by a steamer proceeding at full speed. The collision was caused by illegal lights and faulty movements on the part of the sail vessel. About half a million was involved, and the case obtained an elaborate examination. Judge Blatchford, for reasons too extensive to reproduce, held that Articles 16 and 13 prescribed the duties of the parties. He says, "The *Scotia* kept on at 13 knots an hour," and subsequently that he "can discover no fault on her part." He says, in different circumstances he would have found the *Scotia* in fault for not slowing or stopping when she first discovered the light of the *Berkshire*, but the improper light on the latter made it proper for the *Scotia* to port when she did. On appeal, Judge Woodruff, affirming the decision of the District Court, although differing with some of its reasoning in other respects, approved fully the portions we have quoted. He says: "The law before the statute was that declared by it; and therefore the rule as to slowing would be the same under the one as the other." In page 334 he inquires: "Ought she to have slack

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ened her speed sooner than she did?" Proceeding to answer the query, he says: "Whether the light she saw was on a steamer or on a sailing vessel, no duty to slacken speed or change the course of the Scotia arose until there was reason to apprehend a collision." "The suggestion that it was her immediate duty to slacken speed when she saw the light, assumes what in the first instance is not to be assumed. If she saw the light and observed it diligently, without having reasonable ground for apprehending a collision, no duty to slacken speed, or even to change her course, was created." He illustrates at length the policy of the rule which authorized the Scotia to act with confidence upon apparent indications, without any assumption that there was, or would be, any violation of law on the part of the approaching ship.

To these literally applicable and pointed decisions many may be added which, by their necessary assumption of the rule, are equally efficient in its support. It was not intended to change the "*rule of the road*," so far as any duty in this case was concerned, by the adoption of these articles. The regulations they establish are as old as steam and the modern improvements in navigation. The introduction of colored lights wrought no difference in their principle. They, by a certain indication of courses, made their application more easy. For all time since the matter came under judicial discussion it has been law, when vessels were meeting end on, to port the helm and go ahead with confidence. It is law, equally familiar and equally old, that when vessels of any kind are approaching each other, under circumstances which in any degree indicate to an experienced seaman risk of collision, they must slacken their speed, and, if necessary, stop. This statute being but a reiteration of these principles, must by the most familiar rules of interpretation be read in reference to them. They will be held to modify them only so far as their plain and express provisions compel.

That the old so-called "Golden Rule" of porting and passing to the right was established before the Act of 1864, see *St. John v. Paine* (10 How. 583); *The Nimrod* (15 Jurist, 1201 ;

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Story on Bailm. 611; *The Duke of Sussex*, 1 Wm. Rob. 274; *The Rose* lays down the rule stringently (1 Pars. Adm. 569, and note 4), and fully affirming the rule, see *New York Co. v. Navigation Co.* (22 How. 461), citing some of the leading English and American judgments. The Supreme Court says the rule is well established.

That when approaching each other in circumstances indicating danger of collision, it was the duty of steamers to slow before the adoption of Article 16, is abundantly shown by decisions which are immediately cited for a slightly different purpose.

Save in the case of the *Elgin* and *Jesmond*, the *Rob Roy* and the *Scotia*, before cited, and a few others, judges have seldom taken pains affirmatively to assert the truism that vessels passing each other, where there are no apparent circumstances to indicate danger, need not slacken their speed. But this has been so universally assumed, the law should be deemed at rest.

In order to establish old maxims it is by no means necessary, and is often difficult, to produce cases where the precise point has been raised and adjudicated. In *Calton v. Bragg* (15 East, 223), Lord Ellenborough said: "It is not only upon decided cases, where the point has been passed upon, but also from the continued practice of the Court, without objection made, that we collect the rules of law." In *Smith v. Doe* (2 Brod. & Bing. 598), Lord Eldon, with much spirit, replying to what had been said at the bar, answered: "That the most enlightened judges who ever sat in Westminster Hall always gave the greatest weight to what had obtained in practice." And see 1 Blackstone, 68; Ram on Legal Judgment, 12; *Bennet v. Watson* (3 M. & S. 1); *Prigg v. Pennsylvania* (16 Pet. 539); *U. S. v. Hudson* (7 Cranch, 32); *Briscoe v. Bank of Kentucky* (11 Pet. 257). A long list of concurring judgments, therefore, which necessarily involve a proposition, are as efficacious for its support as if it were affirmatively ruled.

A very large majority of all the decisions in reference to

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collisions, both English and American, assumed as well as settled this principle, that actual perceived danger alone demands the duty of slackening speed.

The Cognac (Holt's Rule of the Road, 133). Two vessels approached end on. The one followed the rule and ported, but the other suddenly starboarded, and brought about the collision. Dr. Lushington pronounced against the offending ship, although the other was proceeding under full steam; no criticism whatever was made upon the rate of speed.

The Concordia (Holt, 142). So far as this question is concerned, the facts are substantially the same as those in the *Cognac*. For a faulty starboard movement, the *Concordia* was condemned for the whole damage, although the other vessel was proceeding with rapidity up to the moment of the collision.

The Mary Sandford (3 Ben. 100). The argument is full to sustain the rule.

The Wenona (8 Blatch. 499). Justice Woodruff reversed the judgment of the District Court, where a schooner with misleading lights, and which made a faulty starboard movement immediately preceding the collision, was run down in the night by a steamer going at full speed. In a judgment admirable for its clearness he demonstrates the legal right of the master of the *Wenona* to proceed in the confident presumption, not only that the schooner's lights were properly placed, but that she would pursue the course they indicated. The facts are so strikingly like those before us, that the judgment in the one case would equally apply in the other. In Lowndes on Collision, 59, *et seq.*, is an intelligent analysis of most of the leading cases where ships have been condemned for too great speed. His citations and comments abundantly show that the duty of slackening speed is dependent alone upon the exigencies indicating danger. *The America* (3 Ben. 424), is another instance of the condemnation of a vessel for a faulty movement in the immediate presence of an approaching ship, when both were proceeding at the usual rate, without any intimation of a fault on that account. *New York Trans. Co. v. Philadelphia Steam Co.* (22 How. 461). A steamer was com-

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ing up the Delaware with unabated speed, and ported in order to pass a tug with a tow attached by a hawser. The latter improperly starboarded, and a collision ensued. The Supreme Court held the steamer did its whole duty if she slowed and endeavored to stop as soon as she discovered the improper movement.

These few judgments are referred to simply to illustrate a mode of argument which may be successfully pursued through nearly all the great mass of decisions where ships at full speed have come into collision, and one has been condemned in the entire damages for sudden faults which could not be anticipated by the other. That those which are most illustrative have been selected, is not supposed. In the brief time allowed for the purpose, it is accidental if they are so.

A long list of judgments illustrating the circumstances in which it is the duty of a steamer to slow, and demonstrating, we think, satisfactorily that they wholly exclude those contained in this record, has been analyzed in the instructive and thorough argument of the respondent's counsel. It has greatly aided the Court. The length of our judgment prohibits what we had intended—its literal adoption. The perusal of these cases, with attention challenged to the argument that all of them with more or less force assume, that some affirmative evidence of danger must be present in order to impose the duty of decreasing speed, will result in a concession of the position (*The Louisiana*, 21 How. 1; *The Jas. Watt*, 2 Wm. Rob. 271; *The Birkenhead*, 3 Wm. Rob. 75; *Nelson v. Leland*, 22 How. 48; *The A. Rossiter*, Newb. 225; *The Buffalo*, Ib. 115; *McCready v. Goldsmith*, 18 How. 89; *The New York*, Ib. 223; *The Bay State*, Abb. Adm. 235; *Northern Indiana*, 3 Blatch. 92; *The St. Charles*, 19 How. 108; *The Louisiana*, 2 Ben. 377; *The Electra*, 1 Ben. 282; *The City of Paris*, 9 Wall. 634).

We have examined these judgments, and can say with confidence, they fully sustain the argument which the learned counsel has deduced from them. They show that if we hold in this case it was the duty of the Free State to slow, where

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every condition before her promised perfect safety in full speed, the judgment will stand without a fellow, unless it finds one in those which have been overruled. Benedict, Conkling, Parsons, Abbot, Angell on Carriers, in laying down the general rule, treat the judgments sustaining it in the same mode. If there be one elementary principle better established than another, we should say it is that which authorizes a seaman, having complied with every rule of navigation, in the absence of all indications of danger, to proceed with unabated speed, in full confidence that others would also perform their duty.

The obligation on the part of the *Meisel* to keep her course is as imperative as that of the *Free State* to keep out of her way. The statutory rules themselves, and the judgments already referred to in reference to the speed of the steamer, clearly affirm it. We add, however, a few adjudications more particularly discussing the precise duty. They all deny the right of this sail craft to return to her former course, after having selected another, immediately in front of an approaching steamer. *The Wenona* (8 Blatch. 499), before cited, goes quite beyond the necessities of this case (*The Scotia*, 5 Blatch. 227; *The Argus*, Olcott, 304; *The Empire State*, 1 Ben. 57; *The Governor*, 1 Cliff. 93; *The Bridgeport*, 6 Blatch. 3; *St. John v. Paine*, 10 How. 557; *The Oregon v. Rocca*, 18 How. 570; *The Scotia*, 7 Blatch. 308; *The Queen*, 8 Blatch. 234).

The Potomac (8 Wall. 590), held a steamer faultless which was running nine miles an hour with no abatement of speed until just before the collision, although a sail vessel was run down, which suddenly changed her course and crossed her bows. The case is much like the present. (See *New York Co. v. Rumball*, 21 How. 372; 1 Cliff. 75, 331, 415, 483.) These judgments and numerous similar ones also establish what results necessarily from the rule itself, that if the sailing vessel must keep her course, and it is the duty of a steamer to avoid her, the mode in which this is to be done is not to be closely criticised. The selection is wholly for the latter.

Having fully approbated the construction which authorized

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unabated speed in the circumstances of this case, we desire to call special attention to the conditions in which alone such a rule will be administered. The utmost diligence will be demanded in order to discover the earliest indications of danger, and prompt precautions required to avoid their consequences when known.

As we understand Article 13, it is a duty to port before any risk of collision has accrued. It would be a fault for which a steamer could be condemned if she waited until there was actual danger, such as is required in Article 16. They, by no means, contemplate the same circumstances, or prescribe duties to be performed at the same time. The former is to be understood as if it read as follows: "If two ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, *if their respective courses were continued*, the helms of both shall be put to port, *before any such risk is incurred*, so that each may pass on the port side of the other." See *The Nichols* (7 Wall. 656), which decides, the porting must be so early that no danger is incurred. If the rule had been so worded, it never would have occurred to Sir R. Phillimore that there was any analogy between it and Article 16. The one would have commanded the duty of porting before any risk of collision arises; the latter that of slowing only where the risk has actually arisen. But the practical and judicial meaning of Article 13 is precisely as if it so read, and it is therefore impossible that the two duties, that of porting and that of slowing, under the 16th Article, can be contemporaneous. Such a result is deduced only by a mere literalism wholly overlooking the substantial mandate to port long before the exigencies arise which call for the duties demanded by Article 16. This interpretation reconciles the rules and warns masters that they must port their helms at such safe distances, and accompanied by such watchfulness and care as would render wholly inapplicable the act of slowing their engines.

The Sunny Side (*ante*, p. 227), just decided by this Court, is an application of the same principle, for the justification of a sail vessel which, keeping her course under

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the rule, ran down and sank a tug. Both judgments are necessary for an understanding of the qualifications with which we would like to see the rule administered. A large number of experienced experts have been examined since the argument, and without exception old masters of sail vessels as well as steamers pronounce the suggestion of a duty to slow in such circumstances a novelty. It is one which is not performed on the one hand, or expected or desired on the other. All with great strength of preference declare in favor of holding both parties inexorably to the rules, and authorizing neither to anticipate a departure by the other until actual present peril demonstrates that further adhesion is beyond all question dangerous. It is said a large majority of all collisions result from a too hasty decision that exigencies demand a deviation.

In the general principles of law we have announced, we have much confidence. Whether another tribunal in a disposition to divide a misfortune may not so criticise the conduct of the Free State as to impute some fault, we are less certain. But believing there is no greater discouragement to able officers, and no greater injustice to liberal owners who compensate them than those hypercritical judgments which demand a standard utterly impossible in practical navigation, and which are always announced in the interests of those but for whose wrongs the losses complained of would never occur, we have brought the steamer's conduct in this case to such a test only as we believe old and able mariners having a love for and a pride in their profession, would sustain. The ruling we make has the sanction of many such.

Decree reversed and libel dismissed.

NOTE.—An appeal was taken from the above decree to the Supreme Court, where the case is now awaiting argument.

DISTRICT COURT.
EASTERN DISTRICT OF MICHIGAN.

HON. JOHN W. LONGYEAR, DISTRICT JUDGE

THE OLD CONCORD.

APRIL, 1870.

PRACTICE.—RIGHT OF MORTGAGEE TO INTERVENE.—REARREST OF VESSEL.

A mortgagee of a vessel has a right to intervene in an admiralty suit for the protection of his interest.

A vessel, discharged from arrest upon giving bond or stipulation, returns to her owner forever discharged from the lien which was the foundation of the proceedings against her, and the Court has no power to order her rearrest.

It seems where the sureties become insolvent, the Court may require the claimant to furnish new sureties, on penalty of contempt, or of being denied the right to appear further and contest the suit.

MOTION to vacate order remanding vessel to the custody of the marshal.

In this case the propeller was arrested November 10, 1868, and bonded on the same day by John Hutchings, claimant, with two sureties. December 18, 1868, Hutchings mortgaged the propeller to Eber B. Ward, who intervened *pendente lite*, setting up his mortgage as the basis of his right to intervene. July, 5, 1869, an order was entered, remanding the propeller to the custody of the marshal, on the *ex parte* application of libellants, on the ground that the sureties had become insolvent

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since the bond was given. Ward now moved to vacate the order so remanding the propeller, on the ground that the Court had no jurisdiction over the vessel after she was so bonded, and therefore had no power to make the order.

Mr. *H. B. Brown*, for the motion.

Mr. *W. A. Moore*, contra.

LONGYEAR, J. It is contended, on behalf of libellants, that Ward has no standing in Court, he being a mortgagee merely, and not the owner or an agent, consignee or bailee for the owner, as required by rule twenty-six. Rule twenty-six has been considerably altered and enlarged, if not entirely superseded by the Act of March 3, 1847 (9 Stat. 181). But the rule and the Act relate exclusively to the conditions to be complied with to entitle a claimant to avoid an arrest of the property, or to obtain its discharge after it shall have been arrested, and not to conditions necessary to entitle a party to intervene *pendente lite*, to participate in the distribution of proceeds, or to protect any interest he may have in the subject-matter of the litigation.

The right of a party to intervene for these purposes has been recognized, both in England and in this country, as extending to judgment creditors who have acquired a lien, and also to attaching creditors. (See 1 Conk. Ad. 55, 66-70, citing *The Flora*, 1 Haggard R. 298, 303; *The Rebecca*, Ware's R. 204; *The Mary Anne*, Ware, 99.)

This being so, what reason can there be why a mortgagee should not be admitted to intervene for protection of his own interest, and contest a forfeiture so far as his right or interest would be prejudiced by the decree? I can see none. I am therefore clearly of the opinion that Ward is properly admitted to intervene as mortgagee, and consequently that he has a right to make this motion, and to be heard upon it.

The next and remaining question is as to the validity of the order remanding the vessel. I shall not stop to argue the ques-

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tion. It seems to be too well settled, both in this country and in England, to need further elucidation, that the vessel, on being discharged from arrest upon the giving of the bond or stipulation, returns into the hands of her owner, discharged from the lien or incumbrance which constituted the foundation of the proceedings against her, forever and for all purposes whatsoever, the surety taken being a substitute for the vessel, and the Court has no power or jurisdiction over her thereafter in the same suit or for the same cause (*The Union*, 4 Blatch. C. C. R. 90, 93; *The White Squall*, Ib. 103; *The Kalamazoo*, 9 Eng. L. & Eq. 557, 560; 15 Law Rep. 563).

No question of fraud, mistake or improvidence in entering into the bond, or discharging the vessel, arises in the case, and therefore need not be considered.

The only remedy that seems to be provided in a case where the sureties shall become insolvent is an application to the Court for an order requiring new sureties to be given. Disobedience to such order would put the party in contempt, and he could be proceeded against accordingly, and be denied the right further to appear and contest the suit until he complied with the order, or otherwise purged his contempt (Adm. Rule 6; Ben. Adm. sec. 492; 2 Conk. Adm. 112).

I am therefore of opinion that the Court had no power to make the order remanding the vessel into the custody of the marshal.

Motion granted.

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THE DAVID MORRIS.

FEBRUARY, 1871.

COLLISION IN ATTEMPTING TO PASS A RAFT.—COSTS.

A tug, having five vessels in tow, while running down a narrow, crooked channel, at a speed, with the current, of about seven miles an hour, overtook and attempted to pass a raft of timber in tow, moving at the rate of four and a half miles an hour, and occupying about one-half the width of the channel. One of the vessels grounded upon the port bank, and the one next astern ran into and injured her: *Held*, that the tug was in fault:

- (1.) For not sooner discovering the raft, and that it was in motion;
- (2.) For attempting to pass it in a narrow channel.

Held, also, that the colliding vessel, not being affirmatively shown to have been negligent, cannot be held in fault.

Where the libellant claimed \$70, and recovered but 30 cents, and the respondents claimed a larger amount of damages than they were able to prove: *Held*, that neither party should recover costs.

LIBEL for towing. The libel alleged the towing of the bark by libellant's tug, the I. U. Masters, from Lake Huron to Lake Erie, August 30th, 1868, and claimed seventy dollars for that service. The answer of Rufus K. Winslow and others, owners and claimants of the bark, admitted the towing as alleged, but denied that the same was worth the amount claimed, or that there was anything due libellants on account thereof, and claimed a recoupment to the full amount of the value of the service, on account of damages alleged to have been suffered by the bark in consequence of unskillful towing.

The facts, as deduced from the pleadings and evidence, were as follows:

The contract as to price was at the usual rate, which was seventy dollars.

There were five vessels in the tow, the bark David Morris being the fourth, and the brig Standard the fifth. A raft of square timber, also passing down, in tow of the tug Clark, was

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overtaken in the narrow channel across the St. Clair Flats, in the twilight of the morning of August 30th, 1868. The channel at this point is about three hundred feet wide. The raft was six to eight hundred feet long, and one to two hundred feet wide, and was passing down the channel nearest its starboard bank, but the tail of it was swinging slowly to port. The tug Masters attempted to pass with her tow on the port hand side of the raft. The first two vessels of the tow went clear; but the third being the one next ahead of the bark, fetched up on the port bank of the channel. This made it necessary for the bark to starboard her helm, and fetch up also on the port bank, in order to avoid a collision with the vessel forward of her, which she did. The bark having thus fetched up, the vessel behind her, the Standard, ran into her, hitting her in the stern, and causing damages, to repair which cost the owners of the bark \$69 70.

The tugs and their tows were moving with the current, which, at that point, was about two and a half miles per hour. The tug Clark, with the raft, was moving through the water about two miles per hour, making her total speed about four and a half miles per hour. The tug Masters, with her tow, was moving through the water about four and a half or five miles per hour, making her total speed about seven or seven and a half miles per hour.

The tug Clark was seen by the mate of the Masters when at least two miles distant, and was then taken by him to be a tug aground. It was not ascertained on board the Masters that the Clark was moving and what she had in tow until within about half a mile of her.

Mr. *H. B. Brown*, for libellant.

Mr. *Wm. A. Moore*, for respondents.

LONGYEAR, J. The question is, was the tug in fault for attempting to pass the tug and raft as she did; and was the collision and damage caused thereby?

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Here was a narrow, crooked channel, the banks of which were submerged on each side by a broad expanse of shoal water, and difficult of navigation even in broad daylight, and navigated safely at any time only by the aid of stakes and other guides. The tug was approaching this channel, with its large tow of five vessels, the entire length of which was not far from 1,800 feet, and moving with the current at a speed of between seven and eight miles an hour. Ahead of her was another tug, just entering the channel with a raft of timber of large dimensions, filling nearly or quite one-half the channel. Without slackening her speed, or waiting for the tug and raft to pass through the channel and into the open water beyond, where there was plenty of room to pass, she overtook the latter, and, at the very narrowest and most difficult part of the channel, attempted to pass, and the catastrophe happened. Surely some good excuse must be made to appear, in order to hold the tug faultless under this state of facts.

It is claimed, in exoneration of the tug: 1. That, when the raft was first seen, the distance was so short that it was impossible for the tug to check down and reduce her speed, so as to allow the raft to pass through and out of the channel ahead of her, without great risk, if not the certainty of the vessels of the tow being thereby caused to run into each other, and that therefore such an emergency existed as demanded a prompt decision of the officer in charge of the tug, and that, although he might not have decided upon the course which may now appear to have been the best, yet, if he was not guilty of negligence in coming to the conclusion he did, there is no liability. The Court recognizes this doctrine as a sound one when the emergency is sudden, and the best way out of it is really a question of doubt. But in such a case the vessel charged with fault must be in no way responsible for the emergency.

In this case the tug Clark, which had the raft in tow, was seen from the tug Masters long before the emergency happened; and in addition to this the evidence is clear to my mind that, with a proper lookout upon the Masters, the raft could

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and would have been seen from her long before it is stated by her officers to have been seen. When the tug Clark was first seen from the Masters, it was the duty of those in charge of the latter to keep a close watch upon the movements of the former, and ascertain, at the earliest possible moment, whether she was aground, as at first suspected, or not, and if in motion, whether she had anything and what in tow. The Clark was moving at the rate of four and a half miles per hour; and in the relative position of the two to each other, and to the bends of the river, she must have been moving diagonally across the bows of the Masters, so that, by the exercise of ordinary diligence, it could have been discovered almost immediately that the Clark was in motion, and that she was moving towards the entrance to the narrow channel. The raft had upon it a house some eight or ten feet high, built of boards, for sheltering the men. This was also in motion, of course, and with the commonest care and attention would have been seen almost, if not quite, as soon as the tug which had it in tow. These rafts, with houses on them, are not unusual on these waters, but, on the contrary, are of very common occurrence, and hence there was no difficulty in determining at once what it was the Clark had in tow. This would have afforded ample time for the speed of the Masters to have been checked down to that of the tug and raft, so as to have allowed the latter to pass through the channel first, without any possible danger to the vessels in tow of the Masters. The time and distance would have been so ample as to leave no room for doubt as to the duty of the officer in charge of the Masters to so check her speed. Therefore, if the Masters did find herself in the emergency claimed, in which there was reasonable doubt as to which was her duty, whether to check her speed or go ahead, she is herself responsible for the emergency, and can, of course, claim nothing on account of it.

In this view of the case it is unnecessary to determine whether the emergency claimed really existed or not. But I think if we were to inquire into it we should find it difficult to determine it in favor of the tug. According to the testi-

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mony of those on board the tug, the raft was seen when at least half a mile ahead. Some of the witnesses state it less than that, but I think, taking libellant's testimony altogether, that is about the proof. The relative speed of the tug and tow to that of the tug and raft was about three miles per hour, not to exceed that. The wind was blowing a stiff breeze nearly ahead. The expert testimony is clear to my mind, that in these conditions there would have been no difficulty whatever in checking the speed of the tug and tow down to that of the tug and raft, in ample time, without the least danger to the vessels of the tow, and that when so checked down the speed would still have been ample for steerage way. That it was the duty of the officer in charge of the tug so to check down, if he could with safety, there is no question; that he could have done so with safety, is so evident, not only from the expert testimony but from the nature of the case, that I think there was hardly room for such a doubt in the mind of a competent officer as the Court ought to recognize. At all events, the danger of undertaking to pass the raft with such a tow was so much greater than that of attempting to check down, that the tug ought certainly to have made the attempt to do the latter.

2. The second position taken in exoneration of the tug is that the collision was caused solely by the fault of the Standard, in not either starboarding and fetching up also on the bank, or porting and running out into the stream in time, so as by the one manœuvre or the other to go clear of the bark after she had fetched up, and that therefore whether the tug was in fault or not, for attempting to pass the raft, she is not liable for the damages done by the collision.

The difficulty in maintaining this position is the want of proof of fault on the part of the Standard. The tug being in fault for attempting to pass the raft, as already found, the burden was upon her to show that the collision and damage were not caused thereby. The proof shows that the David Morris fetched up about abreast of the tail end of the raft, with insufficient room between for the Standard to pass,

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rendering it inevitable that if the latter had ported and passed to the starboard of the former, she must have collided with the raft. Hence her only course was to starboard and fetch up on the bank if possible. There is no proof that she did not attempt to do this, or that her failure to do it was on account of an unskillful attempt. Neither does it appear what her condition or situation was when the emergency arose, so as to be able to judge whether she might have effected the manoeuvre in time. It must be remembered that the tug is responsible for the emergency, and that the burden is upon her to show affirmatively and not by inference merely, that the Standard might have avoided the bark. Not having done so, she is not exonerated.

I hold therefore, that the collision and damage to the bark were caused by the fault of the tug in attempting to pass the raft, and that the owners of the bark are entitled to have the expenses incurred for repairs thereby made necessary deducted from the amount due the tug for towage, and that the tug is entitled to a decree for the balance.

The right of libellant to be paid for the towage, and the right of claimants to have deducted therefrom expenses for repairs arose at the same time, and therefore interest can be computed only on the balance.

The proof shows that the price of the towage was	\$70.00
Expenses of repairs	69.70

Balance due libellant30
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A question was raised as to the costs, and it is contended on behalf of respondents that, under all the circumstances of this case, they should recover costs.

As a general rule the allowance of costs in admiralty is the same as at common law, that is, the prevailing party shall recover costs. But in the exercise of its equitable power, admiralty may hold each party to pay his own costs, or even the prevailing party to pay costs (1 Pars. Sh. & Adm. 544, and note 2).

In this case the real contest has been as to the liability of

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the tug for the collision and the consequent damage to the bark. Upon that issue the libellant has failed, and, instead of the respectable sum claimed by him, he recovers a merely nominal amount. I think, under these circumstances, it would be inequitable to require the respondents to pay his costs. On the other hand the respondents claimed a larger amount for expenses of repairs than they were entitled to. It may have been, and probably was, by mistake, but this does not help them any on the question here presented. I think they are not entitled to costs. Equity and fair even-handed justice in this case requires that each party should be left to pay his own costs (*The Boston*, Olcott, 407; *The Nimrod*, 24 Eng. L. & Eq. 589; *The Cynthia Ann*, Ib. 579).

Decree for libellant.

THE ISLAND QUEEN.

FEBRUARY, 1871.

SHIPMENT OF GOLD COIN.—LIMITED LIABILITY ACT.

Libellant's agent, who was intending to take passage on a steamboat from Detroit to a Canadian port, intrusted a quantity of gold coin to the master before the vessel started, without taking a bill of lading or delivering a note in writing. On returning on board, the coin was missing. *Held*, the vessel was not liable.

LIBEL for breach of contract of affreightment for transportation of two hundred and seventy dollars (\$270) in gold coin, from Detroit, in the State of Michigan, to Texas, in the province of Ontario, Canada.

The facts are that one Daniel B. Odette, in the employ of libellants, on the 25th day of September, 1868, had in his possession, at Detroit, a quantity of gold coin of the value of \$270, belonging to libellants, and went on board the steamer with the coin in his possession, for the purpose of taking passage to

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Texas, in Canada, where libellants resided. The steamer not being ready to leave for an hour or more, and Odette being desirous of going on shore in the meanwhile, and not wishing to carry the coin about with him, asked a person on board whom he took to be the master of the vessel, and who was then acting as such, for some safe place to leave the coin on board, and was shown a closet or cupboard in the master's room. Odette placed the coin in the cupboard, and left the vessel. On his return about an hour afterwards, the coin had disappeared, and nothing has been seen or heard of it since.

Mr. *W. A. Moore*, for libellant.

Mr. *H. B. Brown*, for claimant.

There was no delivery that could bind the vessel or its owners (Angell on Carriers, sec. 129; *Blanchard v. Isaacs*, 3 Barb. 388; *Ford v. Mitchell*, 21 Ind. 54; *Trowbridge v. Chapin*, 23 Conn. 595; *Grosvenor v. N. Y. Cent. R. R.* 39 N. Y. 34).

Sec. 2 of the Limited Liability Act is a conclusive answer to libellant's claim (*Pender v. Robbins*, 6 Jones, 207; *Williams v. African Steamship Co.* 1 H. & N. 300; *Gibbs v. Potter*, 10 M. & W. 70).

The exception in sec. 7 does not apply to the lakes and connecting rivers (*Moore v. Am. Trans. Co.* 5 Mich. 368; s. c. 24 How. 1). Nor to steamboats carrying passengers (1 Abb. U. S. 315).

LONGYEAR, J. The Liability Limitation Act of March 3d, 1851 (9 Statutes at Large, 635), settles this case beyond all question against the libellants. Section 2 of that act provides as follows: "If any shipper or shippers of platina, gold, gold dust, silver, bullion, or other precious metals, coins, jewelry, bills of any bank or public body, diamonds or other precious stones, shall lade the same on board of any ship or vessel without, at the time of such lading, giving to the master, agent, owner or owners of the ship or vessel receiving the same, a

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note in writing of the true character and value thereof, and have the same entered on the bill of lading therefor, the master and owner or owners of the said vessel shall not be liable, as carriers thereof, in any form or manner. Nor shall any such master or owners be liable for any such valuable goods beyond the value and according to the character thereof, so notified and entered."

There is no pretense that this law was in any manner complied with. This point being decisive of the case, it is unnecessary to consider any of the other points raised and discussed on the hearing.

Libel dismissed.

THE STRANGER.

MARCH, 1871.

TUG-BOATS—THEIR LIABILITIES AND DUTIES.

Tugs, though not liable as common carriers, are bound to the exercise of ordinary skill and diligence in taking up, arranging and managing their tows. It is also the duty of vessels in tow to use all possible means to avoid injury, and where injury ensues, to do all in their power to make the damages as light as possible.

A tug, using ordinary care, is not liable for the sudden and unexplained sheering of the tow to the right or left.

The admissions of a party to a suit may be given in evidence as independent testimony, though he has been sworn as a witness, and no impeaching questions asked him.

The statute permitting parties to be sworn has not changed the practice in this regard.

THIS was a libel against the tug Stranger, for unskillful towing of the schooner Monteagle through the Sault Ste. Marie canal on the 24th of June, 1868, in consequence of which she was caused to strike a sunken rock at the entrance of the canal, near its westerly side, breaking a hole through her bottom, and causing her to sink just below the lower lock.

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Schooner claims damages for salvage expenses, repairs, detention, &c., in the sum of \$5,746 40.

The faults alleged against the tug, were :

1. That she entered the canal with her tow at too late an hour.
2. Entered at too great speed.
3. Entered to the right of the centre of the canal instead of the left of the centre, as she should have done, to avoid drawing the schooner upon a sunken rock, the locality of which was well known to the tug, and was unknown to the schooner.
4. Failure to inform the schooner of the existence and location of said sunken rock, or to give any information or orders to the schooner as to entering and getting through the canal safely.
5. Let her steam run down, and so failed to handle the schooner properly, in view of her condition, and thereby caused her to strike again below the lower lock.
6. The master of the tug left her after entering the canal, thereby neglecting his duty.
7. The master of the tug failed and omitted to inform himself of how much water the schooner drew, and how much cargo she carried, as was his duty, and as was the custom, before attempting to take her through the canal.

The answer admitted the towing as alleged, denied all the allegations in the libel of fault on the part of the tug, and charged that if the schooner struck a sunken rock at the entrance of the canal, it was in consequence of her not following the tug, and by her sheering to the westward at the entrance of the canal; that the injury caused thereby was slight, and was not the cause of the schooner sinking below the lock; that the sinking of the schooner at that point was in consequence of her striking a rock there, and was caused by the negligence and mismanagement on the part of the schooner, and without any fault on the fault of the tug. The evidence is noticed in the opinion so far as necessary to a decision of the case.

Mr. Alfred Ruesell, for libellants.

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The vessel in tow is considered under control of the tug, and the tug is liable for an injury to the vessel unless it can be shown that it is not in fault (*The Quickstep*, 9 Wall. 670, 671, and cases cited). This case holds that the tug must see that the tow is properly made up, and that the lines are strong and securely fastened. The principle underlying it is that the tug assumes the responsibility in all things concerning the mode of performance of the contract of towage—that she is the mistress and not the servant—a point upon which previous cases had been in irreconcilable conflict (1 Pars. on Ship. 534, 535, 536).

Consequence is, the tug is *prima facie* liable, and burden is upon her of disproving negligence. She is the pilot, and must keep the tow at a safe distance from the shore and from sunken rocks which are generally known and with the knowledge of the existence of which the tug is chargeable (*The Angelina Corning*, 1 Ben. 109; *The Galatea*, 2 Pars. on Ship. 276, note):

The admission of libellants that the tug was not in fault should be stricken out.

(1) The rule allowing admissions against interest was established when parties were not competent witnesses, and for that reason alone. The party is now merged in the witness; evidence of his admissions becomes impeaching testimony, and the usual foundation must first be laid. His answer in chancery is now of no force except as a deposition (*Roberts v. Miles*, 12 Mich. 297).

(2) The fault of the tug is a mixed question of law and fact, concerning which an admission operating by way of estoppel cannot be made.

Messrs. *W. A. Moore* and *H. B. Brown*, for claimants.

An admission of fault, though a mixed question of law and fact, is competent (*The Manchester*, 1 W. Rob. 62).

Negligence is the omission to do something which a reasonable, prudent and honest man would do, or the doing some-

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thing which such a man would not do, under all the circumstances surrounding each particular case (Sher. & Red. on Neg. sec. 7; *Taylor v. Atlantic Ins. Co.* 9 Bosw. 369; *Blythe v. Birmingham Co.* 11 Exch. 781).

LONGYEAR, J. It may be regarded as now well settled that tugs are not liable as common carriers. They are, however, bound to use ordinary care, skill and diligence in taking up, arranging, and managing their tows (*The Syracuse*, 12 Wall. 171). The vessel being towed has also certain duties to perform, among which are to follow the tug, and in situations of danger, to use all possible means to avoid injury, and when injury ensues, to do all in its power to make the injury as light as possible.

The primary injury complained of, and the one from which all the damages alleged are claimed to have flowed, is that caused by the schooner striking a sunken rock at the upper entrance to the canal. If the tug is not in fault for this injury, then she is not liable at all. If she is liable for this primary injury, then she is also liable for all subsequent injuries and damages to the schooner necessarily and naturally flowing from or caused by it, and which could not have been avoided by ordinary care and diligence on the part of the schooner.

The whole gravamen of the case is contained in the third article of the libel, and is stated in the following words:

“Third. That said tug proceeded on said voyage, and while in said canal, towed said schooner out of, and away from the proper and ordinary course in the centre and easterly side of said canal, towards the westerly side thereof, and ran said schooner upon a sunken rock upon said westerly side, staving a hole in her bottom, whereof she soon sunk just below the lower lock.” And further on, in the fourth article it is alleged, “that the master, mate, second mate, and wheelsman were on deck, and kept said schooner directly after said tug, and the damage was occasioned solely by the fault of said tug, and without fault on the part of said schooner;” thus recogniz in

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the duty of the tow, as above stated, to keep directly after the tug.

The first important inquiry therefore is, did the tug "run the schooner upon a sunken rock" as alleged; and, conceding that the schooner did run upon a sunken rock, did she do so while following directly after the tug, and if not, then was it in any manner occasioned by the fault of the tug?

I think these questions are fully answered by a simple statement of a fact clearly appearing by the proofs, and in regard to which there is no controversy, viz: That on entering the canal, the schooner took a sheer some distance, how far does not appear, to starboard, and that it was while she was on this sheer that she struck. The tug is not charged in the pleadings or proofs with being in any manner in fault for the sheering of the schooner, and as it is clear that she struck solely in consequence of such sheering, and would have gone clear if she had been kept as she is alleged to have been, directly after the tug, it is equally clear that the tug cannot be held in any manner responsible for the schooner striking as she did.

The case of *The Angelina Corning* (1 Ben. R. 109), cited by libellant's advocate, was not one of the sudden sheering of the tow from bad steering qualities or otherwise, as in this case, and consequent running upon a sunken rock, but was that of the sagging or hanging off of the tow to leeward, occasioned probably by the change of course by the tug. It is very easy to see how a tug, knowing of the existence and location of a sunken rock, should be held responsible for running a tow upon such a rock in consequence of a change of course resulting in the sagging or hanging off of the tow in such a way as to bring her upon the rock. In that case the tug would be in fault for not having made due allowance for the sagging of the tow in consequence of the change of course; which is very different from a case of sheering of the tow solely on her own account, and not on account of any act or manœuvre of the tug, and which the tug could not have anticipated, or guarded against even if anticipated; because it

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would have been impossible to have known beforehand which way the tow might sheer. In that case it was held that whether the sagging of the tow was chargeable to the pilot of the tug or to the men on the tow, was immaterial, for the reason that the danger was not known to either.

What would have been the result if the danger had been known to the tug and not to the tow, and the sagging of the tow in consequence of which the injury occurred had been, as in this case, chargeable to the tow, the Court does not intimate.

The case of *The Quickstep* (9 Wall. R. 670), holding that the tug is liable for an injury to the tow, unless the tug can show that she was not in fault, applies exclusively to cases of injury resulting from the violation or neglect of some duty coming within the scope of the duties devolving upon that class of employment.

In that case the primary cause of the injury was the use of imperfect and insufficient towing lines, and the Court held that it was among the duties of the tug to see that the lines were sufficient, and she was therefore held liable. But it certainly cannot be considered among the duties of a tug to anticipate and guard against the tow taking a sudden sheer.

But it is also charged :

1. That the lateness of the hour and the darkness contributed to the result. I think the proof clearly shows that entering the canal at the time they did was at the suggestion and solicitation of those in charge of the schooner, and also that it was not at an unusual hour, and that it was still sufficiently light for all ordinary purposes in navigating the canal.

2. That the tug entered at too great speed. I think this is entirely unsupported by the proofs.

3. That the tug entered to the right of the centre of the canal, instead of at or to the left of the centre, in order to avoid the sunken rock, which rock was well known to the tug and not known to the schooner. The proof shows that the custom is to enter at the centre, and I think there is a clear preponderance of evidence that the tug so entered.

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4. That the tug failed to inform the schooner of the existence and location of the sunken rock, or to give the schooner any information or orders in relation to entering and getting through the canal safely. Without stopping to argue the question whether it was or was not the duty of the tug to give such information, under the circumstances of this case, or in any case of towage through the Sault Canal, a channel perfectly familiar to all the navigators of the upper lakes, and through which those in charge of the schooner had frequently passed, it is a sufficient answer to that charge that under the proofs it is evident that such failure to give the information specified, did not in any manner contribute to the catastrophe. Besides, this charge is inconsistent with the theory of the libel, and the proofs in the case. The theory of the libel is, that the accident happened while the schooner was following directly after the tug, and that it so happened in consequence of the tug's drawing her against or upon the rock. The proof shows that it did not so happen, but, on the contrary, that if the schooner had so followed the tug, she would have passed in perfect safety.

Under this theory and these proofs, it was entirely a matter of indifference whether such information was given or not.

5. The tug let her steam run down after the schooner struck; also failed to examine promptly the extent of the injury done to the schooner; so that, from these two causes, she could not and did not handle the schooner properly in view of her condition, in consequence of which she struck again below the lower lock.

This is a charge of fault on the part of the tug after the accident at the entrance of the canal, and is independent of the question as to the responsibility of the tug for that accident, and there might be some question as to its admissibility under the libel as framed; yet, as some evidence was admitted in regard to it, and it was insisted on in the argument, I will proceed to consider it.

First, that the tug let her steam run down. This is an inference merely, drawn by one one of the witnesses, Mosier,

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from the fact sworn to by him, that the master or person in charge of the tug, when the tug was trying to draw the schooner off from the rocks below the lower lock, and had made two efforts to do so and failed, and he was asked "why he did not go ahead on her," replied, or, to use the language of the witness, "I heard him singing out about the tug that they had to get steam up." She certainly had steam up, or she could not have made the two efforts she did make; and to my mind, it is more rational to infer from what the master said that, although he had on his usual amount of steam, he desired to get up more in order to make an extraordinary effort, than it is that he had let his steam run down. Secondly, that the tug failed promptly to examine the extent of the injury occasioned by the accident at the entrance to the canal. There is no proof that those in charge of the tug knew anything of that accident until the canal had been passed, or nearly so. And then how can it be claimed that it was the duty of the tug to examine the extent of the supposed injury, when those in charge of the schooner did not deem it of sufficient importance to even sound her pumps? I think this charge entirely unsupported.

6. The master of the tug left her, and neglected his duty. It was shown that the tug was in charge of a competent pilot, and therefore the charge is untenable.

7. The master of the tug failed and omitted to inquire of the schooner how much water she drew, and how great a cargo she carried. It nowhere appears that the draft of the schooner or the greatness of her cargo had anything to do with the accident, or that the want of a more minute knowledge of those matters on the part of the tug contributed in any manner to the accident. I hold, therefore, upon the whole, that the tug is exonerated from all blame as charged for the accidents to the schooner.

Other questions were raised and discussed, which it is unnecessary to consider, after having arrived at the above conclusion. I have arrived at my conclusions in this case wholly independent of and without any reference to the proved ad-

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missions of Richards, one of the owners, and Byram, also an owner and master of the schooner, exonerating the tug from blame for the accidents; and it is therefore unnecessary to decide the motion made by the schooner's proctor to strike out that testimony. But as an abstract question, however, it is clear to my mind that evidence of the admissions of parties to the record is just as competent now as it was before parties were admitted to testify as witnesses; and that, too, notwithstanding the parties whose admissions are sought to be proven have been sworn and have testified as witnesses on the trial, and were not asked upon the witness stand whether they had or had not made such admissions. Admissions are allowed to be proven, because they tend to prove some fact or facts pertinent to the issue, and not for the purpose of impeachment. If, however, statements made by a party, not otherwise admissible, are offered to be proven for the latter purpose, then, no doubt, the question should be first asked of the party while on the stand as a witness.

As to the other ground of the motion, that the admissions were of conclusions merely, and that such conclusions were of mixed law and fact, I think they would not be inadmissible on that ground alone. But where admissions are of conclusions merely, and not of facts simply, and have not been acted on so as to work an estoppel, they are entitled to but little weight.

Libel dismissed.

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MARCH, 1871.

SEAMEN'S WAGES.—ACT OF 1790 CONSTRUED.

The provisions of section 6 of the Merchant Seamen's Act of 1790, with respect to the recovery of wages, apply only to the classes of vessels enumerated in the first section of the Act.

The proceedings by summons to the master, provided for in section 6, are cumulative and optional, and the party may resort to an attachment in the first instance.

ON exception to answer, and motion to expunge.

The libel was for seaman's wages.

The answer, by its first, second, and third allegations, ignored the hiring of libellants, the rate of wages, and the rendering of the services as alleged in the libel, but on information and belief, disputed the validity of libellant's claim, and in general terms denied the jurisdiction of the Court.

The fourth allegation of the answer was in the following words: "Fourth: These respondents allege, upon information and belief, that the said steamer, during the season of 1870, was employed in running from the port of Bay City, Michigan, to the port of Pine River, Michigan, making the round trip from said Bay City to said Pine River and return once in each twenty-four hours, and that during said season she made no trip or voyage except between said ports as aforesaid; that since on or about the 4th day of August last, said steamer has been tied up and remained idle at the port of Bay City aforesaid, until about November 1st, 1870, and during that time made no trip or voyage whatever, and that none of the preliminary steps or proceedings provided for and required by the sixth section of the Act of Congress, passed the 20th day of July, A. D. 1790, entitled 'An Act for the Government and

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Regulation of Seamen in the Merchant Service," has ever been taken, or complied with by the said libellants, or any person on their behalf; and these respondents therefore submit that the said libellants ought not to have or maintain their said libel, and they pray that they may be allowed to have the same benefit of this objection and defense as if the same had been especially pleaded to the jurisdiction of this Court in this proceeding."

The exception and motion to expunge related solely to this fourth allegation, and were based upon the alleged reason that the allegations of said article "set forth no defense to said libel or any part thereof."

Mr. *H. B. Brown*, for libellant.

Mr. *Hoyt Post*, for claimant.

LONGYEAR, J. The questions discussed upon the argument of the exception and motion, and which are for decision, are :

1. Does this case fall within the purview of section 6 of the Act of 1790? (1 Statutes at Large, 131).

2. If the case is within the purview of said section, then do the provisions of the section relating to commencement of suits by seamen for recovery of wages, supersede the law in force at the time the act was passed? or are those provisions merely cumulative and optional?

Section six is in the following words :

"That every seaman or mariner shall be entitled to demand and receive from the master or commander of the ship or vessel to which they belong," [he belongs] "one-third part of the wages which shall be due him at every port where such ship or vessel shall unlade and deliver her cargo before the voyage be ended, unless the contrary be expressly stipulated in the contract; and as soon as the voyage is ended, and the cargo or ballast be fully discharged at the last port of delivery, every seaman or mariner shall be entitled to the wages which shall

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be then due according to his contract, and if such wages shall not be paid within ten days after such discharge, or if any dispute shall arise between the master and seamen or mariners, touching the said wages, it shall be lawful for the judge of the district" (or a commissioner appointed by the Circuit Court, as amended by the Act of August 23d, 1842, 5 Stat. 516), "where the said ship or vessel shall be, or in case his residence be more than three miles from the place, or of his absence from the place of his residence, then for any judge or justice of the peace, to summon the master of such ship or vessel to appear before him to show cause why process should not issue against such ship or vessel, her tackle, furniture, and apparel, according to the course of Admiralty Courts, to answer for the said wages; and if the master shall neglect to appear, or appearing, shall not show that the wages are paid, or otherwise satisfied or forfeited, and if the matter in dispute shall not be forthwith settled, in such case the judge" (commissioner), "or justice, shall certify to the clerk of the Court of the district, that there is sufficient cause of complaint whereon to found admiralty process, and thereupon the clerk of such Court shall issue process against the said ship or vessel, and the suit shall be proceeded on in the said court, and final judgment be given according to the course of Admiralty Courts in such cases used; and in such suit all the seamen or mariners (having cause or complaint of the like kind against the same ship or vessel), shall be joined as complainants; and it shall be incumbent on the master or commander to produce the contract and log-book, if required, to ascertain any matters in dispute; otherwise, the complainants shall be permitted to state the contents thereof, and the proof of the contrary shall lie on the master or commander; but nothing herein contained shall prevent any seaman or mariner from having or maintaining any action at common law for the recovery of his wages, or from immediate process out of any Court having admiralty jurisdiction, wherever any ship or vessel may be found, in case she shall have left the port of delivery where her voyage ended, before payment of the wages, or in case she shall be about to

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proceed to sea before the end of the ten days next after the delivery of her cargo or ballast."

I have quoted this section in full for the reason that there are expressions interspersed all through it plainly indicating to my mind the true interpretation to be given of it.

The act is entitled "An Act for the Government and Regulation of Seamen in the Merchant Service." Section one provides that "every master or commander of any ship or vessel bound from a port in the United States to any foreign port, or of any ship or vessel of the burden of fifty tons or upwards, bound from a port in one State to a port in any other than an adjoining State, shall, before he proceed on such voyage, make an agreement in writing, or in print, with every seaman or mariner on board such ship or vessel," etc. Then, after providing what shall be the prices or wages to be paid by any master or commander to every seaman or mariner he shall carry out "without such contract or agreement being first made and signed," and for a forfeiture by such master or commander of twenty dollars for each seaman or mariner so carried out, section one closes as follows: "And such seaman or mariner, not having signed such contract, shall not be bound by the regulations, nor subject to the penalties and forfeitures, contained in this Act." Now, it is apparent, that if section six is intended to provide for the same class of cases as is specified in section one, then the case under consideration does not fall within the purview of section six, because the vessel was not a vessel "bound from a port in the United States to any foreign port," nor "from a port in one State to a port in any other than an adjoining State."

Mr. Sedgwick, in his treatise on Statutory and Constitutional Law (p. 237) says, "It is an ancient and well settled rule, that where any cause of doubt arises, although apparently the doubt attaches only to a particular clause, the whole statute is to be taken together, and to be examined, to arrive at the legislative intent." Applying this rule to the Act in question, we find that by section one a certain contract or agreement is required to be entered into between the master

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or commander and the seamen, and the class of vessels and kind of voyages defined to which that requirement shall apply. By a subsequent part of the same Act (section six above quoted), we find certain rights conferred upon seamen and mariners as to demanding and receiving wages during the voyage, and certain regulations prescribed for the collection of what may be due them on the termination of the voyage, by the express reference to "the voyage," and "the contract." If section six stood by itself—if it was all there was of the Act—the language used, "the voyage," and "the contract," would at once suggest the idea of something lacking, and an incompleteness of expression and meaning. What "voyage?" what "contract?" We might infer, and should be under the necessity of inferring, however great a grammatical inaccuracy, it would involve, that it meant any voyage in which such ship or vessel was or had been engaged, and any contract relating to such voyage. But when we find section six embodied in an Act in other parts of which a certain class of voyages are defined, and a certain contract is prescribed and required to be entered into, the meaning of the language used in section six at once becomes plain, full, and consistent, and we are not only under no necessity of resorting to inference, but are not allowed to do so under the well settled rule of construction above laid down. Sections one and six are but parts and parcels of one general system adopted by Congress for the government and regulation of seamen in the merchant service (as expressed in the entitling of the Act) in the class of cases therein specified. It is foreign to the plain object and intent of the Act, and it is unnecessary, unnatural, and far fetched to attempt to put upon section six any other construction.

Section six, standing alone, is also incomplete and inconsistent in another respect, but which incompleteness and inconsistency not only entirely disappear, but the provisions of that section become harmonious and perfect when interpreted in the light of the last clause of section one. Thus, the idea of the existence of a written or printed contract is so impressed upon section six by the language used throughout, that the

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rights of seamen prescribed by, and the procedure provided for the enforcement of such rights, can hardly be conceived of under said section, in a case in which there is no such written or printed contract. It is impossible to read the section without that impression being produced upon the mind. It is spoken of as "the contract," and "his contract," as containing *express stipulations*, as determining the amount due, as something to be produced, and of which the *contents* may be stated; and it is so spoken of in the same manner and evidently in the same sense as it is in every other part of the Act, and in such parts, too, as without doubt relate to the written or printed contract prescribed in section one. Therefore, standing alone as a law to apply to all cases of collection of seamen's wages, the section is incomplete and inconsistent.

Now let us interpret section six as a part of a system of which section one also constitutes a part. The last clause of section one provides as follows: "And such seaman or mariner, not having signed such contract, shall not be bound by the regulations, nor subject to the penalties and forfeitures contained in this Act." We can now see clearly why section six should, and is consequently made to cover only such cases as arise upon written or printed contracts, and why it makes no provision for any other class of cases. It is because, and only because, by the provisions of the clause of section one above quoted, seamen not signing such contract are not subject to any of the provisions of the Act of which section six is a part. Interpreting section six then as a part of one system, of which section one is also a part, it again becomes complete, harmonious and consistent (See also Cooley's Const. Limitations, 55, 57).

I have been referred by counsel to no adjudicated cases involving the point under consideration, and it is believed there are none reported. Judges Betts, Conkling, and Benedict have alluded to it, however, in their several treatises on Admiralty Practice. Judge Betts (Betts Adm. 67), adopts the construction that the provisions of section six refer exclusively to the class of cases specified in section one. Judge Conkling

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(2 Conkling's U. S. Adm. 68), expresses a doubt, and on account of such doubt, and for reasons based upon certain provisions of the Act of February 26, 1845, extending the jurisdiction of the District Courts to certain cases arising on the lakes, says he had applied the provisions of the sixth section indiscriminately to all vessels embraced by the Act of 1845; that is to vessels of twenty tons burden and upwards. He does not discuss the question at all independently of the provisions of the Act of 1845, and it is quite apparent that his doubt as to the true interpretation of section six, and his disagreement from Judge Betts in his practice under it, arose more on account of the difficulties he thought he perceived in the application of Judge Betts' interpretation of section six to certain cases arising under the Act of 1845, than to anything found in section six independently of the Act of 1845. Saying nothing of the propriety or soundness of resorting to an Act of Congress passed fifty-five years after a former Act in order to arrive at the legislative intent of such former Act, I have simply to observe that it now being conceded that the Act of 1845 is obsolete, and that there is no distinction between the jurisdiction of the admiralty on the lakes and on tide water, it is to be presumed that that learned judge would now adopt the same reasonable interpretation of section six as that adopted by Judge Betts, and would conform his practice to such interpretation.

Mr. Benedict (Benedict's Adm. 507), goes a little further than Judge Conkling. He says, speaking of the practice in cases for collection of seamen's wages, as founded on the Act of 1790, "This is believed to embrace all vessels not in the national naval service. The first three sections of the Act relate to vessels and voyages of a particular character, but other sections of the Act embrace 'any ship or vessel,' 'any seaman or mariner,' and the careful use of different phraseology for different purposes in the different sections, shows that the language, in every case, was intended to have its appropriate force." But then in this immediate connection the learned Judge adds: "The law as administered under this

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Act in the Southern District of New York, will be found very fully laid down in Betts' Practice, pages 59 to 68." Although the learned Judge comments somewhat further upon the practice as adopted by Judge Betts, he nowhere alludes to the difference of views between them, as to the class of cases to which section six applies. This circumstance, as well as others which become apparent to any one examining the matter closely, such as the fact that the reference made is not to section six specially, but generally to "other sections of the Act" (other than the first three sections), while the question arises upon section six alone; also, that the language quoted by him as the words of the Act upon which he bases his opinion, are inaccurate as applied to section six, and the more important fact that he fails entirely to consider the language quoted, or any like language used in section six, in connection with and in the light of the context, all tend strongly to show that this learned Judge and author did not bring to bear upon the question that close scrutiny and intelligent discrimination which usually characterize his writings and opinions. The subject-matter of section six is introduced as follows: "That every seaman or mariner" (general terms, it is true) "shall be entitled to demand and receive from the master or commander of the ship or vessel to which they" [he] "belongs, one-third part of the wages which shall be due to him at every port where such ship or vessel shall unlade and deliver her cargo before *the voyage*" (qualification No. 1—what voyage? See section one) "be ended, unless the contrary *be expressly stipulated in the contract*." (Qualification No. 2—what contract? See section one.) And so throughout the whole section qualifications occur which can be satisfactory explained and understood only by reference to section one, and by the application of those old and well-settled canons of interpretation and construction of statutes to which I have already alluded.

Upon the whole, therefore, I am of the opinion, as to the first question stated, that the provisions of the sixth section of the Act of 1790, for the government and regulation of seamen in the merchant service (1 Statutes at Large, 131), are

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to be considered as referring exclusively to those voyages preparatory to which the master or commander is required, by the first section of the Act, to make an agreement in writing with the seamen. From this it follows that the voyage or voyages in which the wages claimed by the libellants in this case are alleged to have been earned, not being voyages from a port in the United States to some foreign port, or from a port in one State to a port in any other than an adjoining State, as specified in section one of the Act, but, on the contrary, to and from ports in the same State, the case does not fall within the purview of section six; and hence that the exception to article four of the answer is well taken.

I am also of opinion, under the second question stated, that the proceedings prescribed by section six are merely cumulative and optional; and, consequently, even if the case were within the purview of section six, the exception would be well taken. But as the exception is disposed of upon the first question, I shall not enter into any extended discussion of the second.

It is an old and well-settled rule of construction, that "where a right or remedy exists at common law, and a statute is passed giving a new remedy, without any negative, express or implied, upon the old common law, the party has his election either to sue at common law, or to proceed upon the statute" (Sedgwick on Statutory and Constitutional Law, 93, 125, 401, 402, and the numerous cases cited). This rule is applicable to the remedies under the maritime law as well as the common law.

When the Act of 1790 was passed, it was lawful for seamen to commence suit *in rem* in the admiralty by libel, and arrest the vessel in the first instance. The Act of 1790 simply makes it lawful, in certain specified cases, to proceed by summons in the first instance, as preliminary to the libel and arrest. There is no provision expressly negating the old law, and the language used in conferring the right to such new proceeding is certainly very far from implying such negative. The rule of construction above quoted, therefore,

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applies with its full force. This same rule of construction has been applied in numerous cases to another branch of the Act of 1790, viz., that relating to desertion of seamen; and it may be now regarded as well settled that the maritime law of desertion is not superseded by the statute, notwithstanding the latter defines and prescribes punishment for desertion in some respects different from the offense and its punishment as defined by the former; and hence it is optional with the party injured to proceed under the maritime law, or under the statute. I can see no good reason why the same rule should not apply to the provisions of section six, so far as it prescribes a mode of procedure for collection of seamen's wages.

I hold, therefore, that the preliminary proceedings by summons, &c., prescribed by section six of the Act of 1790, are cumulative, and in addition to the ordinary proceedings by libel, according to the admiralty practice, and may be resorted to or not at the option of the libellant. See Judge Sprague's opinion in the case of the ship *William Jarvis* (1 Sprague's Decisions, 485), in which this question is fully and ably discussed, and the above views and conclusions are fully maintained.

The exceptions are allowed.

Motion granted.

The H. P. Baldwin.

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APRIL, 1871.

COLLISION.—VESSELS CLOSE-HAULED ON OPPOSITE TACKS.—LOOKOUT.

Where a bark, close-hauled upon the starboard tack, was approaching a schooner close-hauled upon her port tack, at an angle of about six points, *Held*, that the bark had the right to keep steadily on her course, so long as there was any room for doubt as to the intentions of the schooner.

The fact that the entire crew of the bark, including the lookout, were engaged, shortly before the collision, in tacking the ship, though a fault, was held not to have contributed to the collision, as they had resumed their duties a sufficient time before it took place.

The fact that the schooner was disabled, and partially unmanageable, did not impose upon the bark the duty of avoiding her, unless the disability was manifest to those upon the bark.

The fact that the lookout of the schooner was engaged, with the remainder of the watch, just previous to the collision, in hauling down the flying jib, which had become disabled, was a fault directly contributing to the disaster.

LIBEL and cross-libel for collision between the schooner *Marquette* and the bark *H. P. Baldwin*. The collision occurred between two and three o'clock in the morning of the 10th day of July, 1870, in the Straits of Mackinaw, south of the center of the channel, and off from and a little west of "Old Fort Mackinaw," so called. Both vessels were bound up through the straits—the schooner on a voyage from Oswego to Chicago, and the bark on a voyage from Bay City to Chicago. The wind was west southwest, although somewhat variable, and the night was clear, with occasional scudding clouds. When the two vessels first made each other, they were both close-hauled and running by the wind, but upon opposite tacks—the schooner on the starboard tack, and the bark on the port tack. On nearing each other, the bark, as was her duty, kept off a point or so and passed the schooner under her stern. Each vessel, having subsequently come about,

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found herself again crossing the other's track, close-hauled and running by the wind as before, but on the opposite tacks, the bark now being on the starboard tack and the schooner on the port tack. It was while on these courses the collision occurred, the bark striking the schooner on her starboard side, just abaft the main rigging, and sinking her in about five minutes. Just before the collision, the flying jib pendant of the schooner was carried away by a squall, and the flying jib had in consequence been hauled down. This gave the schooner a tendency to somewhat eat up into the wind, and made it more difficult to keep her away, but did not materially lessen her headway, which was still about three miles an hour. Each vessel kept her course without anything being done by either to avoid a collision, until a collision was imminent (and in view of the manœuvres then made by each was, in fact, inevitable), when the wheel of the bark was ordered hard up (astarboard), and that of the schooner was ordered hard alee (also astarboard). This order on the part of the schooner brought her up into the wind and stopped her headway, or nearly so, and it was while she was in this position that the bark came into her, as before stated.

The faults charged in the libel against the bark were :

1. That she had not a proper lookout properly placed, and attentive to his duty.

2. That she had no competent officer on deck on watch attending to the safe navigation of the vessel.

3. That the proper measures were not taken and orders given in due and sufficient time to avoid the schooner as she lay helpless and disabled.

4. That she came too near the schooner before any efforts were made to avoid her as she lay helpless and disabled.

The faults charged in the libel against the schooner are :

1. That she had no proper and competent lookout.

2. That she did not keep out of the way of the bark.

3. That she was not properly equipped and manned, and her officers and crew were not at their proper posts and attentive to their duty.

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Mr. W. A. Moore, for the Marquette.

Messrs. H. B. Brown and G. V. N. Lothrop, for the Baldwin.

LONGYEAR, J. The evidence showed that each vessel, after she had come about the last time before the collision, laid her course by the wind, and was sailing close-hauled, the schooner on the port tack and the bark on the starboard tack, up to just before the collision, and that the schooner would sail within about six points and the bark within about five and a half points of the wind. The wind being west southwest, the course of the schooner must have been about northwest, and that of the bark about south half west. The two vessels were, therefore, crossing so as to involve risk of collision, and Article 12 of the Collision Act of April 29th, 1864 (13 Stat. 60), applies. By Article 12 it was the duty of the schooner to keep out of the way of the bark, and not having done so, the *onus* is upon her to show some fault on the part of the bark which caused, or at least contributed to, the collision, in order to a recovery against the bark (*The Western Metropolis*, 6 Blatch. 210, 214; *The Black Prince*, 5 Legal Intelligencer, No. 8, p. 39).

I will therefore proceed first to examine the allegations of fault on the part of the bark:

1. That the bark had not a proper lookout properly placed and attentive to his duty.

2. That she had no competent officer on deck or watch attending to the safe navigation of the vessel.

These two allegations will be considered together. I do not think these allegations are sustained by the proofs. It is true that, on coming about, the entire watch, including the lookout and the officers of the deck, were engaged in that manœuvre. While this was in and of itself a fault, it is not such a fault as will make the bark responsible, unless it was the cause of or in some manner contributed to the collision. I think there is a clear preponderance of evidence that the entire watch had resumed their respective duties, and were properly

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attending to them a sufficient length of time before the collision, to take away all probability that their previous digression from their proper duties contributed in any manner to the accident.

The remaining allegations of fault on the part of the bark will also be considered together. They are as follows :

3. That the proper measures were not taken and orders given in due and sufficient time to avoid the schooner as she lay helpless and disabled.

4. That she came too near the schooner before any efforts were made to avoid her as she lay helpless and disabled.

These allegations of fault on the part of the bark necessarily assume :

1. That the schooner had become so disabled and helpless as to prevent her keeping out of the way of the bark, as was her duty.

2. That such disability occurred a sufficient length of time before the collision for the bark to have taken measures to avoid the schooner.

3. That the disability and helplessness of the schooner were known to those in charge of the navigation of the bark, or that the disability was of such a character that, by the exercise of ordinary care and watchfulness on board the bark, it could have been readily seen and its effect understood by them in season for the necessary measures to be taken on board the bark to avoid a collision.

The fact that measures might have been taken, orders given, or efforts made, on the part of the bark, which would have prevented the catastrophe, is not enough. Circumstances must be shown that would make it the duty of those in charge of the navigation of the bark to take the measures, give the orders, or make the efforts (*Williamson v. Barret*, 13 How. 109). It will be readily seen that, under this rule, all the conditions assumed must have existed, in order to make out the allegations of fault last above recited.

First, then, as to the character and effect of the disability : In consequence of the flying jib pendant being carried away by

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a squall, it became necessary to haul down the flying jib, and it was done accordingly, and this was the full extent of the disability. The effect of it upon the navigation of the vessel was to make her *less* manageable, not to make her unmanageable. It gave her a tendency to eat up into the wind, and she would not keep away as quickly as she would with the flying jib up; it checked her headway, but did not stop it entirely, or even very nearly. In fact, the wheelsman had not noticed that it had any effect upon the steering of the vessel. It was then but a partial disability at most—such an one as, while it did not render the schooner helpless, made it necessary for her to have more time to get out of the way of another vessel than she would have needed but for the accident.

Secondly, as to the length of time between the accident and the collision: The evidence shows that the flying jib was hauled down immediately after the pendant was carried away, but how long the downhaul occupied does not clearly appear, but, from all the circumstances, it could have been only a very few minutes; one of the witnesses who assisted thinks it was five minutes. I think it could not have exceeded that, at most. The evidence does, however, clearly show that the completion of the downhaul, the order of the master of the schooner, “ready about” and “hard alee,” the coming up of the schooner into the wind and the collision followed each other in quick and rapid succession—so quick and rapid as to leave but little room for doubt that the collision was inevitable at the completion of the downhaul. There may have been sufficient time after the flying jib pendant was carried away, if that accident had been detected by those in charge on board the bark the moment it occurred, for such measures to be taken on board the bark as would have avoided a collision.

We will therefore pass to the consideration of the third condition named, viz., the knowledge of the disability of the schooner, or responsibility for want of knowledge of it, on board the bark, in season to adopt the necessary measures to avoid a collision:

That those in charge of the navigation of the bark did not,

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in fact, know of the accident to the schooner's flying jib, the evidence is clear and uncontradicted. Was the accident, then, of such a character that, by the exercise of ordinary care and attention on board the bark, it could have been readily seen, and its effect understood by them? It must be borne in mind that it was in the night, and although it was light enough so that outlines of a vessel could be seen at a considerable distance, yet it was not so light that it could be readily distinguished how a vessel carried her sails; and although perhaps unusual, yet it is not so unprecedented for a schooner of the size of the *Marquette* to be under way without her flying jib up, as to warrant the Court in holding, as matter of law, that an approaching vessel must take notice of a want of it, and that such want of it is evidence of such disability as to excuse the vessel from obeying the ordinary rules of navigation. But so it must be held, in order to hold the bark responsible for not taking notice of the accident to the schooner.

But it is claimed that, laying aside the accident to the schooner, the bark had no right unnecessarily to run her down, even though the schooner may have been in fault in the first instance for not keeping out of the bark's way. This is no doubt correct. The evidence shows that the schooner's green light was made from the bark when from one and a half to two miles distant, and that the mate, on being interrogated by the master on two or three occasions whether the schooner was doing anything to keep out of the way, replied that he could not see as she was. Upon this it is claimed it became the duty of the master of the bark himself to take measures to keep out of the way of the schooner. But when did this duty begin? It will not do to say that it began when it became probable that the schooner did not intend to get out of the way, because by Article 18 it was the duty of the bark to keep her course, and and it would not do for her to change it so long as there was any room for doubt as to the intentions of the schooner. So long as there was sufficient space left for the schooner to keep away and pass the bark on the port side, as it was fair to presume she would do, it was not safe for the bark herself to keep

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away and attempt to pass under the stern of the schooner. And so long as the schooner kept her course, as she seemed disposed to do, it was not safe for the bark to come up into the wind, because by so doing she would necessarily throw herself across the bows of the schooner, and at the same time become unmanageable, thus placing herself in peril, a thing which the law never requires of one vessel in order to avoid danger to another.

We see, then, that up to the very point where the space between the two vessels ceased to be sufficient for the schooner to keep away, and thus avoid the bark, all was in doubt and gross uncertainty to those in charge of the bark, as to what the schooner would do. Certainly, up to this point it cannot be said that any duty had devolved upon the bark to take measures to avoid a collision. And who shall say just when that point was passed? This Court cannot, and will not assume to say. The master of the bark stood there with all the circumstances before him, and no doubt used his best judgment, and acted accordingly. And although it is now quite apparent that if he had given the order he did give a little sooner, a collision would have been avoided, yet in view of the doubts with which the matter was surrounded at the time, I cannot say it was his duty so to have given the order, and that the bark is liable because the order was not so given. It is contended also that the order which was given on board the bark was the wrong order; that it should have been "hard down," and the bark thereby brought up into the wind, alongside the schooner, and a collision avoided. I think it is quite clear from the evidence that the order "hard up" was given on board the bark before the order "hard a-lee," which brought the schooner into the wind, was given. Hence, when the order was given by those in charge of the bark, it was still all in uncertainty with them what order would be given on the schooner, or whether any would be given at all. It is quite apparent now, that if no order whatever had been given on board the schooner, a collision would probably have been avoided, or if not, the blow would have been a glancing one, and probably light; and that if the opposite order had been given on the schooner to the

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one which was given, and her stern thereby thrown away from the bark, a collision would, quite probably, have been entirely avoided. I think that the order given on board the bark, under the circumstances in which it was given, was the right order, and even if it was not, the circumstances of doubt under which it was given—circumstances for the existence of which the bark was not responsible—were such as to make it no fault.

As we have already seen, the schooner was under headway up to the time she was thrown head to the wind, and that this occurred but a moment before the collision, and after the order "hard up" had been given on board the bark. Hence, up to that moment, the schooner must be considered as a vessel in motion, whose duty it was to keep out of the way of the bark, and the case comes clearly within the principle of those decisions cited by the bark's advocate, holding that where a vessel commits an error under impending danger, or *in extremis* produced or brought about by another vessel, such error cannot be alleged as a fault by such other vessel. (See *Bentley v. Coyne*, 4 Wall. 509, 512; *The Nichols*, 7 Wall. 656, 666; *The Fairbanks*, 9 Wall. 420, 424; *The City of Paris*, Ibid. 634, 638; *The Scranton*, 5 Blatch. 400; *The Western Metropolis*, 6 Blatch. 210, 214.)

I hold, therefore, that none of the allegations of fault against the bark are sustained.

The remaining questions for consideration are those arising upon the libel of the owners of the bark against the schooner for damages sustained by the bark by the same collision.

The allegations of fault on the part of the schooner, are:

1. That the schooner had no proper and competent lookout.
2. That the schooner did not keep out of the way of the bark.
3. That the schooner was not properly equipped and manned, and that her officers and crew were not at their proper posts attentive to their duty.

As to the first allegation, the only evidence there is upon the subject tends to prove that the schooner had on board a proper and competent lookout. Whether he was at his proper

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post and attentive to his duty or not is another question, and will be considered under the second clause of the third allegation of fault. The first allegation, therefore, is not sustained.

As to the second allegation, there is no dispute as to the fact that the schooner did not keep out of the way of the bark, but it is sought to be excused on account of the accident to the flying jib pendant of the schooner, in consequence of which, it is claimed, she could not get out of the way. This excuse will now be considered in connection with the third and last allegation. As has already been seen in considering another branch of the case, the accident to the flying jib pendant of the schooner caused only a partial disability, and I think the evidence clearly shows that, notwithstanding the accident, the schooner could have kept away and avoided the bark if she had seen the bark in time to have effected the necessary manœuvres for that purpose, and that the only reason she did not do so was, the close proximity of the bark when she was first seen from the schooner. I think it quite clear from the proofs that the schooner had not time, even if she had been in full trim, to make the necessary manœuvres to avoid the bark after she first saw her. The closeness of the proximity, and the shortness of the time, are best determined by what occurred on board the schooner between the time the bark was first seen and the collision. Immediately upon seeing the bark the master of the schooner gave his order "ready about," and then, as soon as that order could be executed, which, of course, was almost instantly, came the order "hard a-lee," repeated three times in a loud voice, and then almost immediately came the collision. The extreme shortness of time between the last order and the collision is shown by the men who had turned in and were awakened by hearing the order. They had barely time to spring out of their berths and run upon deck when the collision came—in fact, one of them tells us that he was helped out of his berth by the force of the blow.

The proof is satisfactory to my mind that the bark was in sight, and with ordinary care and attention on board the schooner might and would have been seen much sooner than

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she was, and in ample time for the schooner, slightly disabled as she was, to have kept out of the bark's way. Why, then, was she not seen sooner than she was? I think this question is fully answered by two facts in the case. Captain Allen, master of the schooner, who was in charge of her navigation at the time, tells us that after the bark had passed him on her port tack, he "did not pay any attention to her, as I thought she was clear of us for the night." The other fact is that the entire watch on board the schooner, except the wheelsman, including the lookout, were engaged, just at the critical moment, in hauling down the flying jib. It was during this time, and while the lookout was thus away from his post and attending to other duties, that the bark was allowed to approach to such fatal nearness to the schooner, and I think that to this fact the collision is justly attributed.

The Supreme Court, in the case of *The Schooner Catharine* (17 How. 177), makes use of the following language: "As to the Catharine, we are not satisfied that she had a proper lookout on the vessel at the time of the collision. The excuse given is, that all hands, a short time previously, had been called to reef the sails, and some evidence is given to prove that this is customary in vessels of this description. However this may be in the day time, we think that such a custom or usage cannot be permitted as an excuse for, dispensing with a proper lookout while navigating in the night, especially on waters frequented by other vessels;" and in this case it may be added, especially with the knowledge of the fact that the bark was somewhere in the vicinity, and might, at any time, come about, and be again crossing the schooner's course.

I think, therefore, that the lookout leaving his post to aid in the flying jib downhaul was a fault, which directly contributed to, if it was not the sole cause of the collision. What the schooner might or might not have been able to do to keep out of the way, if her lookout had been at his proper post, and the bark had been seen when still at a safe distance, is mere matter of conjecture, and something with which we have no concern. The fault consists in the lookout not being at his post,

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and the bark not being seen. I suggest, however, that if the lookout had been at his post, and the bark had been seen in time, as she might, and no doubt would have been, for the schooner to have made an effort to keep out of the way of the bark, and she had found such effort unavailing, or, knowing that she could not keep out of the way, have notified the bark by some signal of her disabled condition, as she in such case would have had time to do, she then would have done her whole duty, and would have been excused.

As it is, her excuse for not keeping out of the way is unavailing, and she must be held to respond for the damages done to the bark.

A decree must be entered dismissing the libel of Allen and Burt against the bark H. P. Baldwin, with costs, and in favor of the libellant Hudson, against the schooner Marquette, for the damages sustained by the bark H. P. Baldwin, and for costs, and referring it to a commissioner to ascertain and compute such damages.

Decree for cross-libellant.

THE SPAULDING.

JUNE, 1871.

MARSHALING OF PROCEEDS.—SALVAGE RANKS GENERAL AVERAGE.

In a distribution of proceeds, salvage services, rendered in getting a vessel off a reef, are entitled to priority of payment as against a claim for general average arising from the jettison of a portion of her cargo.

The fact that one of the salvors had the promise of a third party to pay him if he could not collect from the vessel, does not oust him of his priority.

MOTION for distribution of proceeds.

The schooner was sold, *pendente lite*, on the original libel

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of Ballentine and McAlpine, and the proceeds brought into Court, and now remain in the registry.

Five intervening libels were filed against the vessel. The one first filed was by the Security Insurance Company of New York, and the Buffalo Insurance Co. of Buffalo, for general average on account of the jettison of a quantity of corn.

The other four intervening libels were filed subsequently and simultaneously, as follows: By Wolverton for salvage services in getting the schooner off from a reef where she lay sunken and in a damaged condition, and bringing her to Detroit.

By Campbell and Owen, for repairs to keep her afloat.

By Desotell and Hutton, for use of wharf for same purpose.

By Keith and Company, in part, for storage of a portion of the schooner's furniture and rigging.

The proceeds were not sufficient to pay all the claims, and the contest was as to priority as between the intervening libellants first named, and the other four.

It appeared that in order to get the schooner off the reef, it was necessary to pump the water out of her hold, and that the loss of the corn upon which the claim for general average was based, was caused by the same being pumped out with the water. It was contended:

1st. That as the jettison of the corn was a necessary consequence of the measures adopted for saving the vessel, the claim of libellants on account thereof is really a salvage claim, and hence of equal rank with the other four; and 2d. That the libel for the same having been first filed, it should be first paid.

3d. At all events being of equal rank, it should be paid *pro rata* with the others.

Mr. H. B. Brown, for the insurance companies.

The vessel being ashore upon the reef, any expense incurred in getting her off must be contributed for in general average,

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and is essentially a salvage claim. We claim for the jettison of the corn which lighted the vessel and enabled Wolverton with his steam pump, to get her off. These are both salvage claims and are of equal rank. But we are entitled to priority of payment because our libel was first filed (*The Globe*, 15 Law Rep. 421; *The Triumph*, Ib.; *The Adele*, 1 Ben. 309).

Claims for salvage takes precedence of all others except seamen's wages (*The Elizabeth & Jane*, 1 Ware, 43; *The Paragon*, Ib. 331; *The St. Jago de Cuba*, 9 Wheat. 409).

As against Campbell & Owen's libel, we are also entitled to priority from the fact that Dorr promised to pay for the repairs himself in case they could not be realized out of the vessel. They were made partly, at least, upon his credit, and we are entitled to the benefit of that in distribution (16 Law Rep. 13).

Mr. W. A. Moore, for the intervening libellants.

LONGYEAR, J. It was conceded on the argument, and such is undoubtedly the law, that the lien for salvage takes precedence of the lien for general average. The libel of the insurance companies in this case is in terms for general average, and I can see nothing in the circumstances of the case to warrant the Court in holding it to be anything else, even if the libel had been otherwise.

Without the salvage services the whole was a loss. With the salvage services the loss is reduced to a part only. In the former case there would have been nothing left upon which a lien for general average could attach. In the latter case it has something upon which it may attach, solely because of the salvage services; and it would be not only contrary to the general rule of law above stated, but unjust and inequitable to place such lien as to the part thus saved, upon the same footing, as to precedence, as the lien for the salvage services.

It was also claimed as to one of the libels, that of Campbell and Owen, that the libellants had the promise of one Dorr, that he would pay them for the repairs done by them if they

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could not realize the same out of the vessel, and that their claim being thus otherwise secured, the Court will not enforce their lien upon the vessel to the detriment of other lien holders.

Dorr's promise was conditional, and it is not operative until Campbell and Owen have first exhausted their remedy against the vessel, which by their libel they are now seeking to do. The rule contended for therefore, although a correct one, does not apply to this case.

I hold, therefore, that the respective claims of the several libellants, Wolverton, Campbell and Owen, and Desotell and Hutton, in whole, and the claim of Keith and Co., in part (as to which adjudication has been heretofore made), together with the costs of each, must be first paid before the claims of the Security and Buffalo Insurance Companies, and that those claims must be paid *pro rata*, share and share alike, in case there is not sufficient to pay the whole. In view of the disposition which has been made of the first proposition on behalf of the insurance companies, consideration of their other two propositions has become unnecessary.

Ordered accordingly.

THE MILWAUKEE.

JUNE, 1871.

COLLISION.—STEAMERS MEETING END ON.—RULE OF SUPERVISING INSPECTORS.—SPEED.

It is not enough that steamers navigating a narrow channel are in charge of officers whose general competency is unquestioned ; they should have a pilot on board acquainted with the particular channel, and the want of such pilot is *prima facie* a fault.

The absence of a lookout is not material, if the officer of the deck is in full

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possession of all the information a lookout could give him in time to avoid a collision.

Rule 1 of the supervising inspectors (1865) cannot be construed to authorize one steamer to dictate to another a departure from the rule prescribed by Article 13. The rule, however, may be sustained as an authority for an ascending vessel to propose to a descending vessel to depart from the requirements of the article, and for the descending vessel to accept such proposition, and to make such a departure, when thus mutually agreed upon, binding and valid.

It is incumbent upon the vessel claiming the protection of the rule and a departure from the statutory requirement to show :

- (1) That a proposition to depart from the statute was made by her by means of the signals prescribed by Rule 1, and in due season for the other vessel to receive the proposition and act upon it with safety.
- (2) That the other vessel heard and understood the proposition thus made.
- (3) That the other vessel accepted the proposition.

There is no general obligation upon vessels navigating rivers to keep to the right of the centre of the channel, and no such custom proven to exist upon St. Clair flats.

The testimony of the officers and crew of each vessel, as to the number of whistles blown upon their own vessel, is to be believed in preference to that of an equal number of witnesses upon the other vessel.

Risk of collision begins the moment the two vessels have approached so near that a collision might be brought about by any departure from the rules of navigation, and continues up to the moment when they have so far progressed that no such result could ensue. Under such circumstances, vessels should adopt such a rate of speed as to be at all times under ready and complete control until the risk is passed.

A steamer descending a channel 850 feet wide at 14½ miles an hour, and another ascending at 8½ miles, both condemned for too great speed under the circumstances.

Whether the relative duty of the steamships to slacken speed under Article 16 (when they are approaching each other so as to involve risk of collision), attaches the same moment the duty to port attaches under Article 13 (when they are meeting end on, or nearly end on, so as to involve risk of collision), considered and discussed.

THE collision occurred at about 6 o'clock in the evening, on the 23d day of November, 1866, in the St. Clair river, just above the flats, and in what is known as the Southeast Reach of the South Pass of that river.

The Lac la Belle was a steam propeller, and of large size, being about 1,200 tons burden, and was engaged in the Lake Superior trade; and at the time of the collision was bound

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down on a voyage from Lake Superior ports to Cleveland, in the State of Ohio.

The Milwaukee was a side-wheel steamboat, of great strength and power, and was engaged in carrying freight and passengers across Lake Michigan, between the ports of Grand Haven, in the State of Michigan, and Milwaukee, in the State of Wisconsin. She had been to Detroit for repairs, and at the time of the collision was bound up on her return to Milwaukee.

The Milwaukee hit the Lac la Belle on her port side, just abaft the fore-chains, at an angle of about 45 degrees from the stern, cutting her very nearly in two, and sinking her in about two minutes.

The weather was fine, and it was a good night to see.

This South Pass of the St. Clair river, above mentioned, is a crooked channel, although between the two bends constituting the "Reach" spoken of, and in which the collision occurred, the channel is nearly straight. The width of the channel, for some distance above and below the place of collision, varies from 450 feet above to 1,000 feet below, and within those limits there is always an ample depth of water for the largest vessels navigating the lakes. At the place of collision the navigable channel is about 850 feet wide, and the collision occurred within not to exceed 75 feet of the extreme northerly or American bank.

The course of the river, from a considerable distance above the place of collision, is at first south southwest, and when it reaches a point a little over half a mile above the place of collision, it makes a sudden bend to the westward, which latter course it keeps until, at a point about half a mile below the place of collision, when it makes a sudden bend to about northwest. These two bends are from a mile to a mile and a quarter apart, and between them the channel is nearly straight, with a slight indentation or curve, however, in the north bank to the northward, at just about the point where the collision occurred. Approaching vessels in the day time, and their lights in a good night to see, are in plain sight of each other

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across the low and marshy lands and shoal water within these bends, and for a considerable distance both above and below the bends.

The proofs showed that both vessels were keeping nearer the American channel bank (which was the port hand bank to the Milwaukee and the starboard hand bank to the Lac la Belle), than to the Canadian bank; that the Milwaukee turned the lower bend a little before the Lac la Belle turned the upper bend, but so nearly at the same time as to be practically simultaneous; that the lights of each vessel were first made from the other before either had turned the respective bends in the river, and, of course, the lights of the Lac la Belle then made from the Milwaukee were the green or starboard light and the white light, and the lights of the Milwaukee then made from the Lac la Belle were the red or port light and the white light; that when each so made the other's lights, they must have been about two miles apart, and when each turned the respective bends in the river, which, as we have seen, was nearly simultaneous, they were from a mile to a mile and a quarter apart, and were approaching each other at nearly or quite full speed—that of the Lac la Belle being about $14\frac{1}{2}$ miles an hour, with the current (which at this point is $2\frac{1}{2}$ miles an hour) added, and that of the Milwaukee being about $8\frac{1}{2}$ miles an hour, with the current deducted, making the aggregate speed with which the two were approaching each other by the land about 23 miles an hour, or one mile in 2 minutes and 36 seconds; that these rates of speed were fully maintained by each until collision was inevitable, when the Milwaukee's engine was stopped and reversed, but not in time to produce any perceptible effect upon her speed before the collision occurred.

How the two vessels approached each other, what signals were given by each, and some other facts involved in the case, are stated in the opinion of the Court.

The faults specifically charged in the libel against the Milwaukee were:

1. That she had no sufficient and competent officers and

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crew acquainted with the channel and navigation of the St. Clair river, and at their appropriate and proper places.

2. That they did not answer the signals of Lac la Belle and keep to the right hand side of the river, as both the law and good seamanship require; but, on the contrary, turned to the left, and attempted to pass to the left and to the westward of the said Lac la Belle, contrary to law and good seamanship.

3. Other faults, etc., unknown to libellants, but known to the officers and crew of the Milwaukee, which, when discovered, it was prayed might be inserted in the libel.

The faults specifically charged in the cross-libel against the Lac la Belle were, in the words of the libel:

1. "That said propeller was coming at full speed and showing her green and white lights, and as if to pass on the starboard hand side of the said steamboat. That while so running, and when the said propeller had approached quite close, suddenly she appeared to be swinging to starboard, as if under an order to port, and appeared to be attempting to pass across the bow, and on the port hand side of said steamboat, but on attempting to do so, she was made to run against and collide with the said steamboat Milwaukee."

2. "That although the master of the said steamboat had given his proper signals indicating which side he would pass, and had received an answer to said signal, and when the said propeller had commenced swinging to starboard, as aforesaid, and across the bows of the steamboat, the said master immediately stopped and backed his said steamboat, but so short was the distance between the said propeller and said steamboat, and so great was the speed of said propeller, that the said propeller came on and collided with the said steamboat as aforesaid."

The libellants against the Milwaukee laid their damages at the sum of \$167,000, and the libellants against the Lac la Belle at the sum of \$6,000.

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Messrs. *John S. Newberry, George B. Hibbard, and Willey & Cary*, for the Lac la Belle.

Messrs. *Alfred Russell and G. V. N. Lothrop*, for the Milwaukee.

LONGYEAR, J. The first charge of fault against the Milwaukee is, substantially, not that her officers and crew were generally incompetent, but that they were unacquainted with the channel and navigation of the particular waters in which the collision occurred, and that they were not at their proper places.

As an independent or abstract proposition, I think it is clearly proven that the officers and crew of the Milwaukee had but very little experimental knowledge of that channel. And I think the proofs upon this point are such as to justify the court in holding that their knowledge in this respect was inadequate to the navigation of the difficult passes of the St. Clair river, especially in the night, and that such want of knowledge was sufficient, *prima facie*, to constitute a fault. Here was a large steamboat of great strength and power, to be navigated in the night time through a channel full of tortuous and narrow passages, difficult of navigation even in the day time, and requiring the highest degree of experimental as well as theoretical knowledge of those passages for safe navigation through them. When we add to this the fact that these difficult passages lie right in, and in fact constitute a part of the great highway of the entire commerce of the great Northwestern Lakes, and are consequently literally filled with vessels passing and repassing, both night and day, Captain Trowel's attempt to take his vessel through, without an experienced pilot, however competent he may be to navigate the open waters, certainly seems like the very height of presumption, and was an act deserving a stern rebuke, if nothing more.

But the question, after all, is, was this want of knowledge on the part of the officers and crew of the Milwaukee the cause of, or did it contribute to the collision? The theory advanced

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on the part of the libellants against the Milwaukee is, that when the lights of the Lac la Belle were first made from the Milwaukee, Captain Trowel's want of knowledge of the bends in the river between the two vessels, the lights made being the green and white, led him to the conclusion that the Lac la Belle was crossing the Milwaukee's course, instead of meeting her, and that she would naturally pass to his starboard; and it was assumed that it was this misapprehension that resulted in the collision. The assumed fact upon which this theory is based is, that Captain Trowel did not know of the existence of the bends in the channel. If this fact were sustained by the proofs, or if it were left without direct proofs, to be inferred from Captain Trowel's general want of acquaintance with the channel, the theory might have some plausibility. But, unfortunately for the theory advanced, what proof there is as to that fact is decidedly the other way. In the first place, Captain Trowel swears substantially that he was aware of those bends, and in the next place he must of course have been made aware of the existence of them when the two vessels had turned them, which was in time, with correct management, to have avoided a collision; and finally, the signal given on board the Milwaukee, whether it was a single or a double blast of the whistle, was a signal given only when meeting, showing clearly that Captain Trowel understood at that time that they were meeting and not crossing. I think, therefore, that the theory advanced is rebutted by the facts proven. I shall have occasion, however, to allude to this subject again in connection with another branch of the case.

The only charge made under the other division of the first charge of fault is that the Milwaukee had no lookout. It clearly appears, however, that the captain who was in charge of the navigation of the Milwaukee saw the Lac la Belle's lights and was in full possession of all the information that a lookout could have given him, in ample time to have avoided a collision. It is, therefore, immaterial to inquire into the fact whether there was a lookout or not.

The second charge of fault against the Milwaukee is, sub-

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season for the other vessel to receive the proposition and act upon it with safety.

2. That the other vessel heard and understood the proposition thus made.

3. That the other vessel accepted the proposition.

And these facts must be made out by clear and satisfactory proofs. They must not be left to inference. The statute in question is one of vital importance for the protection of life and property upon the waters, and it will not do to hold a party blameless for a departure from its plain provisions, upon a plea of an agreement or license to do so, except where such agreement or license is admitted, or is made out beyond all reasonable doubt by clear and satisfactory proof. Where the agreement is denied, and the evidence is conflicting and contradictory, and does not clearly preponderate in favor of such agreement, the statute must govern, and the responsibility of parties must be determined accordingly.

In this case it is all the same whether the vessels were approaching each other end on, or nearly end on, and so within Article 13, or crossing, and so within Article 14; for, in either case, the Milwaukee departed from the statutory requirements, to justify which she must prove an agreement authorizing her to do so. If they were meeting end on, or nearly end on, it was the statutory duty of both, under Article 13, to port, which the Milwaukee did not do, but, on the contrary, starboarded. If they were crossing, they were doing so on such courses that the Lac la Belle had the Milwaukee on her (the Lac la Belle's) starboard side, and under Article 14 it was the statutory duty of the Lac la Belle to keep out of the way of the Milwaukee (which she had the right to do by taking either side of the latter), and under Article 18 it was the statutory duty [of the Milwaukee to keep her course, which she did not do, but starboarded.

I find, however, from the proofs that, as matter of fact, the two vessels were meeting end on, or nearly end on, within the meaning of Article 13. That they were so meeting, and in

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such a manner as to involve risk of collision, is evident from the following considerations:

1. From the nearness of their respective courses to the American channel bank.

Each vessel was keeping the American channel bank comparatively close aboard, and was running by it instead of by the compass. When the Milwaukee turned the lower bend, she was, by the estimates of those on watch on her at the time, about 200 feet from the shore, and circumstances seem to warrant that the estimate is very nearly correct. When the Lac la Belle turned the upper bend, she was, in the opinion of those on watch on board of her at the time, not beyond the center of the channel, but in fact between that and the American channel bank, and the circumstances seem to warrant that this estimate is also very nearly correct. As we have seen, the channel at this point was not to exceed 450 feet wide. At all events, it was not to exceed 500 feet so that, allowing the widest latitude, the Lac la Belle was not to exceed 250 feet from the American channel bank at this point. Between these two points (and as we have before seen, the two vessels were at these points at practically the same moment of time), the general courses of the two would be on straight lines, which lines, from the above data, could not be more than 50 feet apart, and might be, and probably were, less than that. The two vessels were then from a mile to a mile and a quarter distant from each other. By actual measurement it will be found that at this stage they could have varied but a very small fraction, not to exceed one-tenth of a point from dead ahead of each other. Even if we place the Lac la Belle within 100 feet of the extreme opposite bank, they would not vary more than one-third of a point from dead ahead. This is certainly as nearly end on as vessels usually approach each other. At all events, it is far within the definition which has been given by the Courts of what is "end on or nearly end on," within the meaning of Article 13.

It can make no difference, in this connection, that the lights of the Lac la Belle, first seen from the Milwaukee, were the

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green and white lights only. This would necessarily be the case until the Lac la Belle had turned the upper bend. In determining how vessels are approaching each other in narrow, tortuous channels like the one here in question, their general course in the channel must alone be considered, and not the course they may be on by the compass at any particular time while pursuing the windings and turnings of the channel.

It is too late, however, to claim that Trowel was misled, by any such appearance of the lights of the Lac la Belle, into the supposition that she was crossing the course of the Milwaukee, because the signal he gave and the manœuvres he made are both inconsistent with such supposition. If the Lac la Belle had been crossing the course of the Milwaukee, and Capt. Trowel had so understood, then any signal to turn to the right or to the left would have been uncalled for and unnecessary, and, of course, would not have been given; he would have simply kept his course as required by Article 18.

It is proper, perhaps, to remark here that I do not subscribe to the doctrine advanced on behalf of the libellants against the Milwaukee, that vessels navigating rivers must, in all cases, when meeting, keep to the right of the center of the navigable channel. I know of no such law in this country, and there is no such custom in the navigation of the channel in question. Vessels navigating rivers in this country, like vehicles in a highway, may use any part of the channel they may see fit, observing, however, in all cases when meeting or passing other vessels, the ordinary rules of navigation.

2. That the two vessels were so meeting—end on, or nearly end on—so as to involve risk of collision, is clear from the evident understanding on the part of each at the time, else why the signals and the manœuvres by each? If there was no risk of collision, there was certainly no necessity and no excuse for any signal by either to go to the right or to the left, nor for the Milwaukee's starboarding as she did, or the Lac la Belle's porting as she did. The fact that each gave a signal intended to be given only in case of risk of collision, and that each changed her course with intent to avoid a col-

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lision, makes it clear that in the judgment of each there was such risk. Articles 13, 14, and 18, and Rule 1, have no operation except in case of risk of collision.

But independently of this, the idea that there was no risk of a collision is fully exploded by the fact that there *was* a collision.

I find, therefore, as matter of fact, that the two vessels were meeting end on, or nearly end on, so as to involve risk of collision, and hence that the case falls primarily under Article 13, which requires each to put her helm to port so as to pass on the port side of the other. The proofs show that the Lac La Belle did so put her helm to port, while the Milwaukee put hers to starboard, and that the collision was brought about solely by these joint manœuvres.

I have also found, as matter of law, as before stated, that the Milwaukee having thus departed from the statutory rule, she is *prima facie* in fault, and that the burden is upon her to show that an agreement was entered into under Rule 1 for such departure, and that to this end it was necessary for her to prove: 1. That she gave the proper signal, viz., two blasts of her steam whistle, proposing such departure, and in due season; 2. That such signal was heard and understood; and 3. That the proposition was accepted by the Lac la Belle.

As to the first proposition, there is a conflict between the testimony of the officers and crew of the Lac la Belle and those of the Milwaukee, as to what signal was heard by the former, and what was actually given by the latter. The testimony of those on board the Milwaukee is all agreed that the signal actually given by her was two blasts, and from their better means of knowledge as to what was done on board their own vessel, under a well-known and recognized rule for weighing conflicting testimony in cases of this sort, it must be held as proven that two blasts of the whistle were given by the Milwaukee, and that they were given so as to indicate the desire and proposition on her part to depart from the statutory requirement of Article 13, and to pass to the left, as provided in Rule 1, instead of to the right, as provided by said article.

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In the view I shall take of the two remaining propositions, which I shall now proceed to consider, it is unnecessary to discuss the question whether the signal so made by the Milwaukee was made in due season. In point of fact, the signal was given at about the time the two vessels turned the respective bends in the river, and, consequently, when they were a mile to a mile and a quarter, or, in point of time, two minutes and a half apart. This would, no doubt, be in season under ordinary circumstances, but in consideration of the speed of the Milwaukee—11 miles through the water, and eight and a half by the land—which, under the circumstances that it was in the night time and in a narrow and crooked channel, of which the officers and crew in charge had comparatively no practical knowledge, was, to say the least, extraordinary, and also in consideration of the further fact that the approaching steamer's lights had been in sight for some time previous, and that it must have been evident to those in charge of the navigation of the Milwaukee that the other vessel was so approaching, also at a high rate of speed, it might be contended with much plausibility that the Milwaukee's signal ought to have been given sooner than it was. But without deciding that point, I pass to the consideration of the two remaining propositions, viz.: Whether the Milwaukee's signal was heard and understood by the Lac la Belle, and whether the proposition thus made was accepted by her.

In this connection it must be borne in mind that the burden was upon the Milwaukee to maintain both these propositions.

In departing from the statutory regulations, she assumed the entire risk of her signal being heard and understood by the approaching vessel, and of herself hearing and understanding the reply. (*The St. John*, 7 Blatch. 220; *The Atlas*, 4 Ben. 27; *The Washington*, 3 Blatchf. 276.)

Here again the testimony of the officers and crews of the respective vessels, as to what was actually done upon the one and heard and understood upon the other, is in direct conflict the one with the other. We might stop right here, and say

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that the witnesses standing in the main on an equal footing as to credibility, and disagreeing as to the main facts, the propositions are not proved; that under the rule heretofore laid down, the proof taken as a whole is not of that clear and satisfactory character necessary to make out a justification for the Milwaukee's departure from the statutory requirement. But this is unnecessary.

Applying the same rule as was applied above to the testimony of the officers and crew of the Milwaukee as to what signal was actually given on board of her, to the testimony of the officers and crew of the Lac la Belle, as to what signal was heard on board the latter, and what signal was given by her, the evidence is overwhelmingly preponderating that the signal of the Milwaukee was actually heard and understood on the Lac la Belle as one blast of the steam whistle, instead of two, and that the signals given by the Lac la Belle were signals of one blast only, although repeated, thus clearly showing that the signal of the Milwaukee was not correctly heard and understood by the Lac la Belle, and that the proposition of the former to depart from the statutory rule was not accepted by the latter.

It was contended, on behalf of the Milwaukee, that, her whistle being a very loud one, if she gave two sounds, two must have been heard on the Lac la Belle. This is an inference merely; of course it is not conclusive as against positive, unimpeached testimony as to what was in fact heard, although it might, and no doubt would, be controlling in the absence of such testimony.

The proof shows that the signal of the Lac la Belle was repeated, and it was contended on behalf of the Milwaukee that the two sounds of the steam whistle thus given were given so nearly together in point of time as, in fact, to constitute but one signal of two sounds within the meaning of Rule 1; or, at least, that the one followed the other so closely as to justify the Milwaukee in assuming, as she did, that they constituted but one signal, and as such indicated an acceptance by the Lac la Belle of the Milwaukee's proposition to go to the left.

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By the proofs there can be no doubt that the two sounds given by the Lac la Belle were intended for separate signals, each as a signal to adhere to the statutory rule, to keep to the right. Yet, if they were given in such a manner as, in fact, to constitute but one signal of two sounds, the Lac la Belle must be held to respond accordingly, regardless of her intentions. It is not sufficient that they were so near together as to create a doubt merely as to which was meant, because in that case the Milwaukee had different duties to perform under other rules (2d and 10th Rules of October 17th, 1865), which duties there is no pretense of her having performed.

The two sounds meant by Rule 1, as a signal, are well understood by all steam navigators, and in fact by all persons at all accustomed to hearing that signal given, to be two sounds in quick succession, constituting a sort of double sound or blast. The witnesses on the part of the Lac la Belle, the mate who gave the sounds, and a large number of the officers and crew who heard them, are fully agreed that the sounds were not of that double character. Estimates of time I place but little reliance upon. But we are not left to rely upon such estimates alone. Many of the witnesses tell us what they were doing, where they went, etc., between the two sounds, showing clearly that a considerable time must have elapsed, and amply sufficient to deprive the two sounds of the character claimed, and to show that the second sound was really such as was intended by the mate of the Lac la Belle then on watch, viz.: a repetition of the former signal of one sound to go to the right. This conclusion is strengthened by the testimony of Durling, the professional pilot of the St. Clair Flats, who was listening to the sounds for a purpose connected with his professional employment, and who had no part or interest whatever in the affairs or navigation of either vessel.

I find therefore that the Milwaukee has failed to justify her departure from the statutory rule to port, and that therefore in this respect she was in fault.

I think the Milwaukee was also in fault in respect to her

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speed. Article 16 of the Act of April 29th, 1864 (Stat. vol. 13, p. 61), provides as follows:

“Every steamship, when approaching another ship so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse,” etc.

This rule is but a re-enactment of what was the law before, and the law so re-enacted is but the embodiment of the dictates of common prudence. Under it a steam vessel is not permitted to approach another vessel, whether propelled by steam or otherwise, whether meeting or overtaking, so near that a collision is inevitable, or even dangerous, before taking the prescribed precaution. *Risk of collision* is sufficient to bring such steamer under the rule, and there is always risk of collision in case of vessels meeting or passing in a crooked and comparatively narrow channel like the one here under consideration. This the Milwaukee did not do, although she saw the Lac la Belle long before they came together. But, on the contrary, she was kept at quite or nearly her full speed up to but a moment before the collision, when her engine was stopped and reversed, but too late, and of course to no purpose. This excessive speed on the part of the Milwaukee was all the more reckless and inexcusable, and makes the fault all the graver and more reprehensible, for the reason that, as we have seen, her officers and crew were unacquainted with the channel, and for the further reason that such speed was entirely unnecessary. She was going against the current, and nothing like her rate of speed was necessary for steerage way.

It is, of course, impossible to lay down any precise rule as to just what rate of speed steam vessels shall adopt under such circumstances; but it is perfectly safe to say that they should adopt such a rate of speed as to be at all times under ready and complete control until the risk is fully passed, and this is certainly not the 11-knot speed of the Milwaukee, if we take it through the water, or her 8½-knot speed, if we take it by the land. But I shall notice this subject of speed further when considering the charge of excessive speed made against the Lac la Belle, which I shall now proceed to do.

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The faults charged against the Lac la Belle, briefly stated, are substantially :

1. A sudden and unexpected change of course to starboard.

This charge is fully disposed of in favor of the Lac la Belle in what has already been said.

2. Excessive speed.

The speed of the Lac la Belle, as we have seen, was about twelve miles an hour through the water, and about fourteen and a half miles by the land. That of the Milwaukee was about eleven miles through the water and about eight and a half by the land. The Lac la Belle was moving with the current, and therefore not so readily controlled nor so easily stopped as the Milwaukee, which was moving against the current. She was aware of the approach of the Milwaukee in ample time to have adopted the precautions dictated by Article 16 above quoted, as well as by common prudence, by checking her speed so as to be under ready control. The same risk of collision, and the obligations thereby imposed, were upon her as were upon the Milwaukee. And yet we find her dashing down the current at nearly or quite her greatest rate of speed—a rate of speed, too, which is nearly, if not quite, equal to that of the fastest steamers navigating the great lakes, and keeping up that rate of speed with all the risk and danger fair before her, without check or diminution, up to the very moment of collision. If we may recognize degrees of fault in such cases, the fault of the Lac la Belle in this respect, notwithstanding the greater familiarity of her officers and crew with the channel, was even greater than that of the Milwaukee.

It was claimed that the obligation to check did not attach to the Lac la Belle, because but for the mistake of the Milwaukee in starboarding when she ought to have ported, there was no danger of collision—that the Lac la Belle had a right to assume that the Milwaukee would obey the law, and if she had done so there would have been no collision, notwithstanding the excessive speed complained of. This doctrine, carried to its ultimate results, would avoid all rules having for their object the enforcement of precautionary measures for prevention

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of collisions, and would recognize the right of a vessel, herself technically obeying the rules, unnecessarily to run another down, which, accidentally or otherwise, might come in her way in consequence of some non-observance of those rules, neither of which results would for a moment be recognized as law by the learned advocates who advanced the doctrine stated.

Conceding, however, all that is claimed, the *Lac la Belle* was still in fault for not slackening her speed. The moment the Milwaukee starboarded and showed her green light to the *Lac la Belle*, there was danger of collision. This occurred, as we have seen, when they were a mile or a mile and a quarter apart. It then, if not before, certainly became the duty of the *Lac la Belle* to slacken speed.

I think, however, it is open to discussion under Article 16 whether the obligation of a steamship approaching another vessel to slacken speed does not attach the moment *risk* of collision is involved, and whether, under that article, it is allowable for such ship to wait to see if there is absolutely *danger* of collision before doing so. Danger of collision is, of course, included in risk of collision, but it is not all there is of it. There is never danger of collision other than by inevitable or inscrutable accident, where all fully and completely obey the law. Danger of collision begins only when one vessel or the other begins to depart from the rules established by law. Risk of collision begins the very moment when the two vessels have approached so near each other and upon such courses, that by a departure from the rules of navigation, whether from want of good seamanship, accident, mistake, misapprehension of signals, or otherwise, a collision might be brought about. It is true, that, *prima facie*, each has a right to assume that the other will obey the law. But this does not justify either in shutting his eyes to what the other may actually do, or in omitting to do what he can to avoid an accident, made imminent by the acts of the other. I say the right above spoken of is *prima facie* merely, because it is well known that departures from the law not only may, but do, take place, and often. Risk of collision may be said to begin the moment the two vessels have approached so near that a collision might be

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brought about by any such departure, and continues up to the moment when they have so far progressed that no such result could ensue (*The Nichols*, 7 Wall. 663).

The language of Article 13, prescribing the condition in this regard, in which the helm of each shall be put to port, and that of Article 16, prescribing the conditions under which they shall slacken speed, is precisely the same "so as to involve risk of collision." From this it would seem to follow that the obligation to slacken speed attaches the moment the obligation to port attaches, and that the former obligation continues while the latter continues—or, in other words, that the obligation to slacken speed under Article 16 always co-exists with the obligation to port under Article 13. The doctrine here asserted is forcibly illustrated by the case now under consideration. No one will contend for a moment that Capt. Trowel, of the Milwaukee, intended to disobey the law, but, on the contrary, I think, all must concede that he intended to obey it. He evidently misconceived his legal rights, and probably misapprehended the signals of the Lac la Belle, which misconception and misapprehension, and his consequent starboarding instead of porting, as we have seen, was the primary cause of the collision. The Milwaukee is held in fault in this respect, not because Capt. Trowel's departure from the law was willful or intentional, but simply because it was unauthorized.

Such misconception of law and misapprehension of fact are occurring upon the waters daily and nightly, and it is to them that the great bulk of collisions is to be attributed, and the risk of collisions from these causes constitute by far the larger portion of the risks of navigation growing out of collisions; and, I think it may be assumed that when risk of collision is spoken of in the law, it includes this risk as one of its principal elements. But as we have already seen, it is not necessary to go to that extent in this case.

It cannot be successfully claimed on either side that the failure to slacken speed did not contribute to the collision. The aggregate of the speed of the two was about twenty-two miles an hour, or one mile in a little over two minutes and a half. If the speed of each had been slackened to even one-

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half what it was (and I think it ought to have been slackened more than that), each would have been afforded an opportunity to fully comprehend the mistake which had been made; and to provide against it. It is fair to presume that if this had been done we should not now be considering one of the most, if not the most calamitous and deplorable collisions ever recorded as happening upon the Great Lakes and their connecting waters.

I find, therefore, that the collision was caused primarily by the unauthorized departure of the Milwaukee from the statutory rule prescribed by Article 13 of the Act of 1864, requiring each vessel, in the situation in which the two then were, to put her helm to port so as to pass on the port side of the other, and that a contributing cause of the collision, and without which it is fair to presume it would not have occurred, notwithstanding such primary cause, was the gross and inexcusable failure on the part of each vessel, and more especially the Lac la Belle, to slacken speed as required by Article 16. It results, therefore, both vessels being in fault, that there must be a division of damages.

The importance of this case not only to the parties immediately interested in respect to the amount involved in dollars and cents, but also to the interests of commerce and navigation in respect to the principles involved, has led me into a close and careful scrutiny and consideration of the facts in the case, and of the able and exhaustive arguments and briefs of the learned advocates on both sides, from which I have derived much aid in my investigations—such a scrutiny and consideration as those interests, both private and public, seemed to demand. I have been led also into a somewhat extended elucidation of my conclusions, thereby the more thoroughly to test their correctness, and also in order that if either party, or both, feeling aggrieved by my conclusions, shall desire a review, the appellate Court may have before it my reasons in full, and be thus enabled the more readily to judge of their soundness or unsoundness.

Decree for a division of damages.

NOTE.—For a full discussion of the question of speed, see *The Free State*, ante, p. 251.

THE GENERAL CASS.

JUNE, 1871.

JURISDICTION—NAVIGABLE WATERS.—CHARACTER OF VESSEL.—
LIGHTERS.—LIEN FOR TOWAGE IN HOME PORT.

Saginaw river, though wholly within the State of Michigan, is a public navigable stream, and within the admiralty jurisdiction.

If the business or employment of a vessel appertain to travel, or trade and commerce on the water, it is subject to the admiralty jurisdiction, whatever may be its size, form, capacity, or means of propulsion.

Such jurisdiction extends to lighters employed in carrying lumber out to vessels lying in deep water.

The fact that these lighters are not enrolled or licensed does not affect the question of jurisdiction.

A lien attaches for towage services rendered in the home port.

LIBEL for towage, by George P. Felcher, owner of the tugs Challenge and Kate Felcher.

The third article of the answer of William Mitchell, claimant and owner of the scow, alleged, "That the said scow is a mere float or lighter, has no means of propelling, neither sails, anchors nor chains; has never been enrolled or licensed, and is employed solely in the navigation of the Saginaw river to float lumber thereon over the bar and shallows, in tow of tugs and steamers;" and the jurisdiction of the Court was therefore denied.

Libellants excepted to the said third article and moved to expunge the same.

Hearing upon the exception and motion.

Mr. *H. B. Brown*, for libellant.

Mr. *Wm. A. Moore*, for respondent.

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LONGYEAR, J. The question of jurisdiction raised by the third article of the answer, is :

1. As to the waters upon which the service was rendered, the Saginaw river being wholly within a State, and a tributary merely, emptying into the lakes but constituting no part of them, or of their connecting waters.

2. As to the character of the craft, the same being a mere float or lighter, with no means of propulsion of its own, etc.

3. As to the necessity of enrollment and license in order to bring a vessel under the admiralty jurisdiction of this court.

First. Since tide water has been ignored as the test of admiralty jurisdiction under the Constitution and the judiciary Act of 1789, the Act of 1845, purporting to extend a limited jurisdiction in admiralty over the lakes and their connecting waters, no longer has any influence in determining the extent of admiralty jurisdiction over the northern and northwestern lakes and rivers. The test of such jurisdiction as to the waters over which it extends, now is, that they are public navigable waters (*The Genesee Chief*, 12 How. 443; *The Eagle*, 8 Wall. 25).

Those waters are navigable in law which are navigable in fact, and those are public navigable waters which are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water (*The Daniel Ball*, 10 Wall. 557):

That Saginaw river, from Saginaw City to its mouth, upon which the towage services are claimed to have been rendered, fully answers the description above given, there is and can be no dispute. It is therefore public navigable water, and is clearly within the admiralty jurisdiction of this Court.

Second. The true criterion by which to determine whether any water craft, or vessel, is subject to admiralty jurisdiction, is the business or employment for which it is intended, or is susceptible of being used, or in which it is actually engaged, rather than its size, form, capacity, or means of propulsion. (*The Kate Tremaine*, N. Y. Trans. Mar. 30th, 1871; s. c. 4

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Am. Law T. 92; 1 Conk. Adm. 27-30; Ben. Adm. secs. 217-221).

A test is to be applied here similar to that above applied in determining the extent of admiralty jurisdiction over the waters upon which vessels are used. If the business or employment of vessels appertain to travel, or trade and commerce on public navigable water, it is sufficient, and the jurisdiction attaches. This test is based upon principle, while any test based upon size, form, capacity or means of propulsion must, from the nature of the case, be entirely arbitrary. The former is also certain and reasonably well defined, and hence, if generally adopted must have the same application everywhere, while the latter admits of no well defined line of distinction, and, being arbitrary in its application, would be subject to the mere caprice of the different judges by whom it is applied.

The lumber of the Saginaw valley, as an article of commerce, passing down and out of the Saginaw river, on its way to the lumber marts of other States and countries, constitutes one of the greatest interests of its kind in the world, and in its transportation employs vessels of all sizes, forms and capacities, and all kinds of propelling power, from the insignificant scow, like the one here in question, to the largest sized vessels and steamers that float the lakes. The business and employment of each, irrespective of the accidents of size, form, capacity or propelling power, appertains equally to trade and commerce, and all are therefore equally subject to the jurisdiction of this court.

Large sized vessels cannot pass out of Saginaw river with full loads on account of a bar or shoal at the mouth, where it empties into Saginaw bay. Such vessels, consequently, after taking on part of a cargo in the river, pass out over the bar, and then complete their loading from scows or lighters, upon which it is brought to them. These lighters seldom belong to the vessels, but generally to either the lumber dealers upon the river, or—which is more often the case, and is understood to be the case here—to persons who own neither vessel nor lumber, but who make this species of transportation their principal

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or sole business. They have no propelling power of their own, but depend entirely upon being towed to and fro by tugs and steamers. The business and employment, therefore, of these scows consisting, as it does, in the transportation of lumber, an article of commerce, a part of the way on its road to market, by water, clearly appertains to trade and commerce, and thus far, at least, they are clearly within the jurisdiction. But it is said that because they have no propelling power of their own, they are not themselves engaged in navigation, and are therefore not within the jurisdiction. I do not think this proposition a sound one, for various reasons.

The application of steam to navigation has upset many of the old theories upon which admiralty jurisdiction was based, and materially modified others. Before this event, commerce upon the water depended almost exclusively upon the utilization of the wind, by means of masts and sails. When steam power made its advent upon the water, it was as a stranger thrust in upon the maritime family, and the Admiralty Courts looked at it askant, and hardly knew where to place it, or whether to recognize it at all. But so rapidly did it gain in favor, and so soon did it obtain a commanding position in the commerce of the world, that it was speedily taken in and domesticated in the admiralty fold, without further question, let or hindrance, on account of its not being graced with the traditional masts and sails, or of its being the mere invention of man, to take the place of the free winds of heaven.

The use of steam upon the water soon wrought other innovations upon ancient usage, among which was the use of vessels commonly called barges, with no propelling power of their own—neither the traditional masts and sails, nor steam—having capacity merely, and none of the means of navigation except the ordinary steering apparatus, depending for locomotion upon steam power, it is true, but applied by means entirely outside themselves. Commerce upon the lakes and rivers of this country is now largely carried on in this class of vessels; and it is perhaps safe to assume that nearly one-half the vast carrying trade in iron, copper, grain and lumber, upon the

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great lakes and their tributaries, is now carried on in them; and they are rapidly increasing in numbers and capacity.

This character of craft was also a stranger in the maritime family, and at first was also looked upon with distrust by the Admiralty Courts. But so prominent a place do these vessels now occupy, that like their progenitor, the steamboat, of which they are in fact, a mere excrescence, they too must be, as they already in fact have been, taken in and domesticated in the admiralty fold. And this jurisdiction is maintainable on principle, as well as from necessity. There is certainly no reason why it is not navigation, all the same whether a vessel is propelled by a steam engine placed within her hull, or by the same engine by means of a tow line. It is, in fact, one of the revolutions wrought by the use of steam, that it has abolished all distinctions as to propelling power in determining admiralty jurisdiction.

But these barges and the scows upon Saginaw river, of which the one here in question is a sample, are equally engaged in a business or employment appertaining to commerce, and each is equally dependent upon the same means of locomotion. The service rendered by each does not differ one iota in kind, but only in degree or extent. The service being maritime, as we have seen, no criterion of jurisdiction founded upon the mere accident of the degree or extent of it, can be recognized. No such line can be drawn without legislation, however desirable it may be to rid the Court of cases involving small amounts, and concerning petty crafts. Hence, if jurisdiction is denied as to the scows, it must be as to the barges, and being recognized as to the latter, as we have seen it is, it must be as to the former.

Another consideration upon which some emphasis may be laid, arises out of the fact that water crafts of the description here under consideration, are recognized, by necessary implication, as vessels, by, and as such subject to, the navigation laws of Congress.

By the Act of July 20th, 1846 (9 Stat. 38), "*Canal boats without masts or steam power,*" are expressly exempted from

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payment of the hospital tax required of registered, or enrolled and licensed vessels, and also from liability to attachment for seamen's wages. If such boats, "without masts or steam power," were not included in the general provisions of law requiring the tax, or of the maritime law making them subject to attachment, what was the necessity of the exemption?

By sec. 1 of the Act of March 2, 1831 (4 Stat. 487), "Any *raft, flat, boat or vessel* of the United States, entering otherwise than by sea, at any port of the United States on the rivers and lakes on the northern, northeastern, and northwestern frontiers," are expressly exempted from levy of custom house fees from and after a certain then future date. If such craft were not subject to such levy under the general laws in relation to vessels, then certainly there was no necessity for the exemption, or, at all events, there would have been no sense in postponing such exemption to a future day.

So, too, by a provision at the end of the liability limitation Act of March 3, 1851 (9 Stat. 636), it is enacted that "this Act shall not apply to the owner or owners of any *canal-boat, barge, or lighter*, or to any vessel of any description whatsoever used in rivers or inland navigation." Now, the general terms used throughout the act are, "ship or vessel." Here is a clear implication, therefore, that Congress understood "ship or vessel" to include the craft named in the proviso.

See, also, sec. 47 of the Act of February 28, 1871, "to provide for the better security of life on board of vessels," &c. (16 Stat. 454), in the provisions of which water craft of the kind here under consideration are expressly included. (See, also, *Gibbons v. Ogden*, 9 Wheat. 1; *The Kate Tremaine*, above cited; Ben. Adm. secs. 219, 220.)

I am aware that there has been some wavering on the part of some of the Courts upon this question of jurisdiction in such cases; and the Court was cited to several decisions, especially in the cases of the *Coal Barges* (3 Am. Law Reg. 391, 394) and *The Farmer* (Gilpin, 524), seeming to bear against the conclusions above arrived at. In the case of the *Coal Barges*, it is to be observed that the things which were called

“barges” were mere temporary boxes, in which coal was to be transported to its destination, and were then to be broken up and sold for lumber. They were, to all intents and purposes, like the bales or boxes in which goods, wares, and merchandise are ordinarily transported, the only difference being in the mode in which the boxes were carried, being towed through the water by the vessel, instead of being placed upon it—a very different case from the present. And in the case of *The Farmer*, it appears that the learned Judge had announced his decision before he wrote his opinion, and from his acknowledged inability to draw a line upon which to base his decision, and from the dissatisfaction expressed by him as to his conclusions, one can hardly read the opinion without coming to the conclusion that if the opinion had been written first, the decision would have been the reverse of what it was (see 1 Conk. Adm. 28, 29).

Numerous cases might be cited in which the jurisdiction has been maintained in cases in many respects similar to this one. (See especially *The D. C. Salisbury*, Olcott, 71; *The Flora*, 3 Chicago L. N. 130; *The Canton*, 1 Spr. 437.) I think the weight of argument is entirely with this latter class of cases.

Third. Admiralty jurisdiction exists and is exercised in the United States, under and by virtue of the Constitution and the Judiciary Act of 1789, and independently of the navigation laws of Congress. It therefore has no regard to registry, or enrollment and license. The notion that upon the lakes and rivers the jurisdiction depended upon registry or enrollment and license, was derived entirely from the provisions of the Act of 1845, by which the jurisdiction was expressly limited to vessels of that character, and the clause of sec. 9 of the Act of 1789 relating to “seizures under the laws of impost, navigation and trade of the United States,” both of which—the said Act of 1845 and the said seizure clause—are now obsolete (*The Genesee Chief*, 11 How. 458; *The Coal Barges*, 3 Law Reg. 393, 394; *The Flora*, 3 Chic. L. N. 130; *The Eagle*, 8 Wall. 15).

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It is, therefore, a matter of indifference whether the scow in this case was enrolled and licensed or not, so far as the question of the jurisdiction here invoked is concerned.

Another question was raised and discussed at the hearing, which, although not involved in the exceptions and motion, yet for the purpose of disposing of all preliminary questions, will now be considered.

The learned advocate for the respondent contends that the towage services having been rendered in the home port, no lien attaches, and that, therefore, this Court has no jurisdiction *in rem*.

I do not consider the position a sound one. So complete seems to have been the acquiescence of the bar in the doctrine that a lien for towage does attach under such circumstances, that the question does not appear to have been raised, or, if raised, that the decision of it does not seem to have been considered of sufficient importance to be reported. It has been assumed, however, by high authority, that such lien does attach. (See 1 Conk. Adm. 28, note; *The Sarah Jane*, 2 Law Rev. 455; *The Kate Tremaine*, N. Y. Trans. Mar. 30, 1871, p. 3; s. c. 4 Am. L. T. 96.)

The inclination of the Courts is not to circumscribe the class of maritime contracts on account of which a lien shall be held to attach, but rather to enlarge it. It is now well settled that a lien attaches for contracts, in the home port, of affreightment, for pilotage, for seamen's wages, and for wharfage, and why not for towage? It has the same elements as the others, and the same tests are applicable to it—it is to be performed on maritime waters, and in relation to a business appertaining to trade and commerce (*The Canton*, 1 Spr. 439; *De Lovio v. Boit*, 2 Gall. 398; *The Belfast*, 7 Wall. 624, 637; *N. E. Ins. Co. v. Dunham*, 11 Wall. 1).

But, it is said, no lien attaches by the maritime law to contracts for supplies and repairs furnished in the home port, and it is asked why should it attach to the contract for towage made in the home port? The question is a pertinent one; but it may be asked as well in regard to the contracts of affreight-

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ment, for pilotage, and for seamen's wages. The answer to the question must be that there is no reason for the discrimination. But I think that answer furnishes an argument rather in favor of abolishing that unjust discrimination against contracts for supplies and repairs, than for extending it to other subjects; and I expect, at no distant day, to see it wiped out by Act of Congress or otherwise.

It is also said the amount involved is small, and the vessel is a petty craft, and if this jurisdiction is entertained, it will bring upon the Court a flood of petty cases. I do not apprehend any serious embarrassment from this source. Nevertheless, the full and complete answer to the suggestion is, as has been already intimated, that no line can be drawn defining just where jurisdiction shall begin, and just where it shall end, in respect to the matters named, without legislation.

The exception to the third article of the answer is sustained, and the motion to expunge the same is granted.

Motion granted.

THE MASTERS AND RAYNOR.

JULY, 1871.

COLLISION WITH VESSEL AT ANCHOR.—PROPER ANCHORAGE.—
ANCHOR WATCH.

In the absence of a law or custom prohibiting vessels from lying in a channel, anchorage there is not necessarily improper because the channel is narrow at that point, and vessels are constantly passing and repassing, if room be left for vessels and tows to pass in safety. In such an anchorage, however, a vigilant anchor watch is imperatively necessary.

LIBEL for a collision between the bark Fame and the schooner Wm. Raynor.

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On the 8th day of October, 1868, about seven o'clock in the evening, the bark *Fame* lay at anchor in the St. Clair river, a little below Port Huron, and just opposite the foot of the middle ground (so called), which is on the American side of the river. As she so lay at anchor, the tug *I. U. Masters* came down the river with a tow of four vessels, the fourth vessel in the tow being the schooner *Wm. Raynor*. The tug undertook to pass the bark on the American or port side of her, and between her and the said middle ground, and in doing so the schooner sagged off to port and came in collision with the bark's jibboom, carrying it away, and doing other damage.

The current at this point is about four and a half miles an hour, and the wind was blowing quite strong, nearly down the river, but varying a little across the current from the American side.

The bark was lying with her bows up stream, but the wind had swung her stern a little—not to exceed one point, and probably less—toward the Canadian side of the river. The course of the tug, in attempting to pass the bark as she did, was a little across the wind and the current, and the immediate cause of the collision was the tail of the tow being carried down against the bark by the wind and current.

Mr. *W. A. Moore*, for libellant, claimed:

(1) That the bark lay bow up stream, with sails furled, light properly placed and burning, steady at anchor, and occupying not over 35 feet in width.

(2) That the channel was from one-quarter to one-third of a mile wide, and not difficult of navigation.

(3) That it is usual for vessels driven in by stress of weather to anchor in a channel of that width.

(4) That two-thirds of the navigable channel lay on the starboard side of the bark.

(5) That if she lay nearer the middle of the river, the tug had sufficient room to pass on the American side.

(6) That, so far as the schooner was concerned, the accident was unavoidable, and the tug is responsible.

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Mr. *H. B. Brown*, for the tug.

A vessel colliding with another at anchor *in a proper place* is *prima facie* in fault, but if she be anchored in an improper place she cannot recover, unless the other vessel has grossly neglected her duty in passing her (*Strout v. Foster*, 1 How. 89; *Knowlton v. Sanford*, 32 Me. 148; *The Marcia Tribon*, 2 Sprague, 17; *O'Neil v. Sears*, Ibid. 52).

The bark ought not to have anchored in the narrowest part of the channel, without some good reason, when there was plenty of room above and below.

The bark was also in fault for not having a proper anchor watch (*Buzzard v. Scow Petrel*, 6 McLean, 491).

LONGYEAR, J. There was no satisfactory proof before me as to the exact width of the river at the point in question, but it is near enough for the purposes of this case to assume, and such, I think, the proofs tend to show, that it is from one-fourth to one-half a mile wide. The proofs are contradictory as to the precise point where the bark lay in the river, varying from one-third of the distance from the American channel bank (the middle ground before spoken of) to the middle of the channel; but there is no dispute but that there was room on both sides of her for vessels and tows to pass, and that is sufficient for the purposes of this case.

The proofs show that the schooner was in no manner in fault for the collision, and the case against her was in effect abandoned at the hearing. The libel must therefore be dismissed as to her, and the case will be considered as against the tug alone.

Where a vessel at anchor is collided with by a vessel in motion, the latter is always *prima facie* in fault, provided the former is anchored in a proper place, and herself observes the law.

In order to exonerate the tug from this *prima facie* liability, it is contended that the bark was anchored in an improper place—that the channel is narrow, and vessels and tows are constantly

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passing and repassing, and owing to a curve or bend in the river just above, and the strength of the current, the whole channel is needed for safe navigation, unobstructed by vessels lying at anchor. Many witnesses were sworn on both sides as to the safety and propriety of a vessel lying at anchor at the point in question, but I think their testimony may all be summed up in this: that there are safer places for vessels to lie at anchor, and where they would be a less obstruction to navigation, both above and below the place in question, and which the bark might have reached if she had chosen to do so. No law or custom was shown, however, prohibiting vessels from anchoring there, but, on the contrary, it appeared that others had anchored there, and the legal right to do so was conceded. It also appeared from the proofs that there was room on both sides the bark for vessels and tows to pass in safety, by the exercise of due care and diligence. I must hold therefore that the bark had a legal right to lie at anchor where she did.

While so holding, however, I must also hold that, having selected a comparatively insecure and inconvenient place to lie at anchor, no matter whether from necessity or from choice, she was bound to exercise the greatest degree of care and diligence in keeping watch and ward for her own safety and the safety of passing vessels. A vigilant anchor watch was essential under the circumstances, and the want of it would constitute a fault which could not be overlooked. Had the bark such a watch?

The only man on deck was Druillard, the pilot, and he was not there in the capacity of or on duty as a watch at all. In fact, the purpose for which he was there, as stated by himself, shows that there was not only no watch as such, but that there was no pretense of any. He says, in substance, that he was there for the purpose of keeping himself warm by walking. It is true, when he accidentally, or otherwise, noticed the close proximity of the tow, he called the mate to put the wheel to port, but even this was not done in time to effect anything. If there had been a vigilant watch on board the bark, such as the circumstances in which she had voluntarily placed herself

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imperatively demanded, the danger would have been seen and the helm put to port, and thus by the force of the current the stern of the vessel would have been worked over against the wind, and the jibboom turned off to starboard in time, in all probability, to have cleared the schooner entirely, or, at all events, so nearly as to have much lessened the damages. If, in addition to this, the cable had been allowed to run out and the vessel to drop down the stream with the current, the collision would have been avoided with almost absolute certainty.

Because the bark had not such a watch, and did not take any effective measures to avoid the collision, she must be held in fault (see 1 Pars. Ship. & Adm. 576, 577, and cases cited in note upon p. 577).

But this does not exonerate the tug from inquiry into her conduct, or from responsibility, if she was also in fault. It is contended, on behalf of libellant, that the tug ought to have taken the Canadian side of the river, where there was more room, and where the wind and current would have carried the tow away from the bark, instead of bringing it directly down upon her. The excuse made on behalf of the tug for not taking the Canadian side is that there were other vessels within that space at the time, making it dangerous to take that side. I do not think that it appears by the proofs that the position of those other vessels was such as to make it any more dangerous to pass on that side than on the other. But, as we have seen, there was room to pass on either side, and the tug, no doubt, had the right to pass on either side which in the best judgment of her master was the most feasible under the circumstances as they appeared to him at the time. Having made his choice, however, and that choice involving, as it did, the necessity of crossing the wind and current, the inevitable effect of which was as apparent then as it was afterwards, it became the duty of the master of the tug to make due allowance for that effect. This, of course, he did not do, or the collision would not have occurred (see *The New Philadelphia*, 1 Black, 76).

The tug is therefore held also in fault.

Both vessels being in fault, it follows that each must bear

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a moiety of the damages. A decree must be entered in favor of libellant against the tug for a moiety of his damages and costs, referring it to a commissioner to ascertain and report the damages, and dismissing the libel as against the schooner.

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NOVEMBER, 1871.

PRACTICE.—SECURITY FOR COSTS IN WAGES CASES.

A seaman suing for his wages cannot be compelled to give security for costs for the sole cause that the amount claimed is small, and the indebtedness is denied in the answer.

MOTION for security for costs.

The libel in this case was for seaman's wages. The answer denied there was anything due to libellants. The claims, as set up in the libel, were for small amounts, being for \$5, and \$11 46, respectively. The motion was founded upon the facts that the claims set up are small in amount, and the denial of any indebtedness contained in the answer.

Mr. *W. A. Moore*, for the motion.

Mr. *E. E. Kane*, *contra*.

LONGYEAR, J. It is conceded that under Rules 9 and 10 of this Court, this motion is addressed exclusively to the discretion of the Court. Unless the Court is prepared to say that in all such cases where the amount claimed is small and the indebtedness is denied, without any showing of improvidence or bad faith in the bringing of the suit, security for costs shall be given, the motion in this case cannot be granted.

The exemption of seamen from giving security for costs in

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suits for wages, under the proviso to Rule 9, is general. No distinction is made as to the amount claimed, and I can find no authority for the Court to make any such distinction without an amendment or abrogation of the proviso. And to say that security shall be required in all cases where the indebtedness is denied by the answer, without any showing of bad faith, would be a practical abrogation of the proviso in a great majority of cases; because, that is usually the very question involved, and to try which the suit is brought.

Common seamen are often transient persons, having no fixed place of residence, and generally of no pecuniary responsibility, and therefore unable to give security. It is upon this presumed inability that the exception is founded. To require them to give security in all cases would be a virtual denial of justice, and would place them at the mercy of their employers. They must not, however, abuse the privilege; and in all cases where the presumption of their inability to give security is overthrown, or it is satisfactorily shown that bad faith has been practiced in bringing the suit, or that the suit was unnecessarily brought, the Court would not hesitate to exercise the discretion reserved by Rule 10, and require security to be given (See *Wheatley v. Hotchkiss*, 1 Sprague, 227).

Motion denied.

The Silver Spray's Boilers.

THE SILVER SPRAY'S BOILERS.

FEBRUARY, 1872.

SALVAGE UNDER CONTRACT.—LIMITATION TO AMOUNT AGREED ON.—
SUBSALVORS.

Services rendered in pulling boilers out of a navigable river, into which they had fallen from a steamboat, are salvage services.

An agreement for a specific sum dependent upon success does not alter the nature of the service as a salvage service, but only furnishes a rule of compensation.

Such an agreement will not be set aside and a commensurate salvage awarded because it proves to be a hard one for the salvor.

A person hired by the salvor to assist him, with knowledge that his employer is operating under a contract, is also limited in the amount of his recovery by the contract price, and the fact that he is misinformed as to the terms of the contract, creates no additional liability on the part of the property or its owners.

On the libel of David Beard and Robert McArthur, for salvage.

The libel alleged the loss of the boilers from the wreck of the Silver Spray, in Lake Huron, while the wreck was being raised (the vessel having been sunk by a collision), the abandonment of the boilers by the owners and insurers, and the raising and saving of the same by the libellants; that the value of the boilers was \$2,000; and that the value of the libellants' labor, time, skill, expenses and use of machinery and teams were, in all, \$1,825, for which they claim a lien on the boilers.

The answer of John H. Moore admitted the boilers dropped into the water from the wreck while being raised, substantially as alleged in the libel, except that it happened in St. Clair river instead of Lake Huron, but denied that the same were lost or abandoned, as alleged; admitted that libellant McArthur raised the boilers and put them on shore, and at some trouble and expense, but not to the value and amount alleged, and

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denied that the boilers were worth \$2,000; alleged that the boilers were so raised by express agreement with said McArthur to do the same for \$100, and a tender of that sum before the libel was filed.

On the facts, which will appear in the opinion of the Court so far as necessary, it was contended on the part of the respondent:

1. That there was a contract with the libellant McArthur to raise the boilers and put them on shore for \$100, and no more.

2. That there being such contract the claim was not a salvage claim, and that, therefore, the libel must be dismissed.

3. That if a salvage claim, notwithstanding the contract, then the decree must be for the \$100, and no more.

4. That there having been a tender after suit brought, costs could be awarded only up to the time of such tender.

On the part of libellants it was conceded that there was a contract with McArthur, but it was contended:

1. That such contract was for "*\$100 and salvage.*"

2. That if the contract was as contended by respondent, for \$100 and no more, then, the amount being so grossly inadequate to the amount of labor, skill, and money actually expended, the Court would disregard the contract and award a proper sum as salvage.

3. That the libellant, Beard, not being a party to the contract, was entitled to salvage without reference to it.

Mr. *John Atkinson*, for libellant.

Mr. *W. A. Moore*, for claimant.

LONGYEAR, J. It being conceded that there was a contract, the point to be determined is what was the compensation agreed on, that being the only point in dispute in this regard. The bargain, whatever it was, was made before anything had been done toward raising the boilers.

Moore, the claimant, testifies that the bargain was for \$100

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for all services and expenses in raising the boilers and putting them on shore. McArthur testifies that it was for \$100 "and salvage"—that the \$100 was for finding the boilers, and that for raising them and putting them on shore he was to have a fair salvage compensation. McArthur's son testifies that he was present during a portion of the conversation, that he heard his father say he must have salvage, that he heard something said about \$100, but did not understand what it was for. A Mr. Reilly, who had been acting for Moore in the matter, was also present, and he testified that he heard nothing said about salvage in addition to the \$100, but he understood that amount to be in full for all services and expenses in raising the boilers, but as he was quite hard of hearing his testimony is not entitled to very much weight as to verbal statements, although he is an intelligent and a credible witness as to all facts within his knowledge.

The statements of Moore and McArthur are positive and in direct conflict, and that too in regard to a matter of fact in regard to which there should be no dispute between them. This being the case, the surrounding circumstances become of great importance.

The boilers dropped from the wreck, and filled and went to the bottom very near where they dropped. This was of course in presence of persons in charge of the wreck, and being in a narrow river and in only about 20 feet of water, the finding of them by those interested could be no very difficult task. McArthur testifies that he discovered them accidentally while crossing the river in a skiff. Moore testifies positively that he knew where they were before he learned it from McArthur, and that, although the owners had abandoned the wreck to the insurers, the insurers, for whom he was acting, had not abandoned the boilers, but were intending to recover them, and in these statements Moore is in no manner contradicted. Is it probable that McArthur would claim, or Moore agree to pay, \$100 for information which thus accidentally fell in the way of the former, without any expenditure of labor, skill, or money, and which was already in possession of

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the latter, or which was at all events of so easy access? I think not. This is rendered still more improbable, and the true nature of the agreement becomes still more apparent, when we consider what transpired before Moore and McArthur met. It appears that Reilly, who lived near where the boilers were, and knew McArthur, wrote to Moore, who lived in Buffalo, recommending McArthur as a proper person to employ to get the boilers out. Moore, in reply, wrote to Reilly, under date of May 19, 1870, as follows: "I am informed it will not cost over \$30 to drag the boilers on shore. Simply throw chains or ropes around them, and put a snatch-block, with a horse, and drag them ashore in half a day. But if your man will take them on shore, up on the bank of course away from the water, I will give him \$100. * * * Please write me what the man says, or let him do it." Reilly testifies that, after he received Moore's letter, he had an interview with McArthur, and read the letter to him, which is also admitted by McArthur in his testimony. Reilly further testifies that, immediately after this interview, he wrote to Moore, which letter, under date of May 23, 1870, was put in evidence, and as the statements in it correspond with Reilly's testimony, and are entitled to some additional weight because they were made while the facts were fresh in the writer's memory, I quote from it. Reilly, in this letter, says: "I have seen and read your letter to McArthur. He will go to work in a few days and see what he can do. The weather does not permit just yet. I think that there will be a little more difficulty than you think about drawing the boilers on shore, on the ground that there is a steep bank which they have to be dragged over, and that bank is a bank of sand. However, I told him that no matter how much work he done that he would get nothing for it unless that he took the boilers clear away from the water."

Reilly further testifies that in his negotiations with McArthur the latter set up no claim, nor even mentioned any claim, for finding the property, nor for salvage, in addition to or otherwise than at the price proposed by Moore in his letter,

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but, on the contrary, what took place between them, and the result of it, is substantially set forth in his (Reilly's) letter to Moore.

It was in this state of the case, and under these circumstances, that Moore and McArthur met, some four or five days after the interview between Reilly and McArthur, and the bargain was concluded. These circumstances strongly corroborate Moore's statement that nothing was said about salvage in addition to, or otherwise than the \$100, and my mind is led irresistibly to the conclusion that the contract was that the \$100 was to be in full for all services, time, labor, skill and expense in getting the boilers out and putting them on shore, and that such was the clear understanding of its terms by both parties at the time.

Another consideration adds much strength to this conclusion. If the contract was for \$100 and salvage, as now claimed by libellants, why did they not set it up in their libel as the basis of their claim? That they did not do so, but set up a claim for salvage merely, is a circumstance of great weight, tending to show that at that time they had no such understanding, and that the claim now set up is an after-thought. The theory of the libellants in filing their libel undoubtedly was the same which the Court is now asked to adopt, viz.: That the contract, having turned out in the event to be a hard one for the libellants, it would be disregarded, and salvage proper be awarded.

I find, therefore, that the service was rendered under a specific contract with McArthur, to be paid \$100, in case of success, in full for all labor, time, skill and money, expended in the premises. Beard's relation to the matter will be noticed hereafter.

The second point made by respondent's advocate was not insisted on, and indeed it is well settled in England and in this country that an agreement for a specific compensation does not alter the nature of the service as a salvage service, but only furnishes the rule of compensation; especially where, as in this case, the right to receive the compensation agreed on

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was made dependent upon success (2 Pars. Ship. and Adm. 309, and notes 1 and 2; *The Wm. Lushington*, 7 Notes of Cases, 361; *The Catharine*, 6 Notes of Cases, Supp. XLIII, LI, where the question is quite fully discussed; *The A. D. Patchin*, 1 Blatchf. 414, 424; *The Emulous*, 1 Sum. 207, 210; *The Whitaker*, Sprague's Decisions, 229, 282; *The Independence*, 2 Curt. 350; *The Jenny Lind*, 1 Newb. 443, 447, 448).

That the nature of the service was a salvage service, I think, admits of no doubt, even though the property saved may not have been derelict (2 Pars. Ship. and Adm. 291). It was maritime property, and it lay sunken in maritime waters. In *The Emulous* (1 Sum. 210), Judge Story says: "I take it to be very clear, that wherever the service has been rendered in saving property from the sea, or wrecked on the coast of the sea, the service is, in the sense of the maritime law, a salvage service" (see also cases cited *supra*).

The third point made by the respondent, and the second point made by libellants, will be considered together. On the part of the respondent it is contended that the compensation must be limited to the contract price, and, on the part of the libellants, the Court is asked to disregard the contract, and award them a sum as salvage somewhat commensurate to their expenditures.

As the matter turned out, it was no doubt a hard bargain for the libellants. But I do not understand that a Court of Admiralty will set aside a contract for that cause alone, where it is free from all fraud, deception, mistake, or circumstances of controlling necessity.

McArthur had ample time for consideration, and there is no pretense of any fraud or deception on the part of Moore or his agent Reilly, or that McArthur did not know all about the situation, and the difficulties in the way of getting the boilers out, and there was no controlling necessity, of duty or otherwise, to undertake the job. The contract appears to have been entered into openly and fairly in all respects, and there is no principle or authority upon which the Court can disregard it, or make a new contract for the parties. It must, therefore, be

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enforced as it stands (see 2 Pars. on Ship. & Adm. 307, and notes 2 to 5; *The True Blue*, 2 W. Rob. 176, 180, a case very much like the present, except that in that case the expense was largely increased by a storm having come on, and yet the contract was enforced although the disparity was great; also *The Henry*, 2 Eng. L. & Eq. 564; *The Phantom*, Law Reports, 1 Adm. 59; *The Salasia*, 2 Hagg. 262; *The A. D. Patchin*, 1 Blatchf. 422, 423; *The Whitaker*, Sprague, 229, 282, a case very much like the present; *Bearse v. Pigs of Copper*, 1 Story, 314, 328).

McArthur was under no obligation to continue the work after he saw it must be a losing operation. His compensation was dependent upon success, and he was at liberty to abandon the work at any time. Parties, after having entered into a deliberate and explicit agreement, must not be encouraged to make large expenditures beyond the contract price at the expense of the owners, by the Courts, loosely or without the most cogent reasons, disregarding contracts thus entered into, and free from all circumstances of fraud, deception, mistake, or oppression existing at the time the contract was made. Parties must understand that contracts fairly entered into will be strictly enforced in admiralty, as well as elsewhere.

But it is contended that the libellant Beard, not being a party to the contract, is entitled to salvage, without reference to the contract. I do not think this position can be maintained. Beard was hired by McArthur, and was informed by the latter that he was operating under a contract. If McArthur misinformed him as to the terms of the contract, that is a matter between them, and such misinformation cannot operate to create any additional liability on the part of the property or its owners. McArthur was not, by virtue of his employment, an agent of the owners to create any liability beyond that for which he had contracted. The case of *The Whitaker* (cited *supra*) was very much like the present case, except in that case the original contractor Holbrook gave up the job entirely to Otis, who undertook and performed it. The Court refused to decree in favor of Otis, without Holbrook being first made a

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party libellant with him; and then, although Otis had expended between \$2,000 and \$3,000 in that service, the Court limited them to the contract price, which was only \$900.

Beard's compensation, like McArthur's, was dependent upon success. He, therefore, stands in as good position as McArthur as to lien, but no better as to amount.

As suit was brought immediately after the service was completed, and without any demand or refusal to pay, no interest can be allowed. The tender was made September 10, 1870, which was after this suit was commenced. Costs must, therefore, be allowed up to, but not after that date. As the money tendered was not brought into Court, a decree must be passed in favor of libellants.

Let a decree be entered in favor of libellants for \$100, and costs up to September 10, 1870.

Decree for libellants.

NOTE.—See *The Marquette*, post, p. 364.

THE OTTAWA.

FEBRUARY, 1872.

JURISDICTION.—INJURY TO WHARF.

An action will not lie in admiralty against a vessel to recover damage done by her to a wharf projecting into navigable water.

Wharves are but improvements or extensions of the shore, and injuries done to them, no matter by what agency, are injuries done on land, and do not constitute maritime torts for which an action in the admiralty can be maintained.

THIS was a libel *in rem*, by Wm. P. Stafford and Clark Haywood, lessees of a wood dock or wharf, extending from the shore some distance over the water, at Port Hope, on Lake Huron, for a collision with, and damage to, their wharf by the propeller Ottawa, on the 6th day of November, 1869.

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The propeller stopped at libellants' wharf for a supply of wood. After she had obtained a supply, the agent of libellants in charge of the wharf, fearing damage from a storm which was then threatening, requested the master of the propeller to leave the wharf with his vessel. To this the master consented, but his engineer, fearing the storm, refused to work the engines, and the vessel remained moored to the wharf, the master saying to the agent he would pay for any damage she might do. The storm came on, and the propeller, by pounding against the wharf, and otherwise, damaged the same to the amount of \$154 45.

Mr. *H. B. Brown*, for libellants.

Mr. *W. A. Moore*, for claimants.

LONGYEAR, J. The only question in this case is whether a lien exists and a libel *in rem* can be maintained against the propeller for the injury and damage complained of.

The criterion of admiralty jurisdiction in cases of tort is locality. That is, the injury must be done on maritime waters, or, as applied to the lakes and to rivers, navigable waters. Lake Huron comes within this category. Therefore, if the injury done to the wharf may be considered as done upon the waters, the libel will lie. If, on the contrary, a wharf is to be considered as land, as real estate, or on the land, or in fact the shore, then the libel will not lie. It is of no consequence that the damage was done by a maritime thing, the vessel, if it was not also done upon the water (*The Plymouth*, 3 Wall. 20; *Ransom v. Mayo*, 3 Blatch. 70; 23 How. 215).

The English cases cited by libellants' advocate, *The Uhla*, reported in a note to *The Sylph* (Law Rep. 2 Adm. and Ec. 28); *The Excelsior* (Ib. 268); *The Sylph* (Ib. 24); may all be dismissed with the single remark, that they are referable to an Act of Parliament known as the Admiralty Court Act of 1861, by which jurisdiction in the admiralty is expressly

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conferred in case of "any claim for damage done by any ship," etc., and in regard to which Dr. Lushington, in the case of *The Uhla*, remarked: "I take it to mean any case of damage done by a ship; there is no limitation, no restriction expressed." These cases, therefore, throw no light upon what is maritime law upon the subject.

Mr. Parsons, in his work on Shipping and Admiralty, at page 599, says, "It not unfrequently happens that vessels are injured, or cause injury, by striking upon wharves, or coming into contact with incumbrances in the docks beside or between the wharves. Such cases give rise to questions concerning the rights, duties, and liabilities of the vessels, or their owners, on the one hand, and of the owners of the wharves, on the other." He then cites several cases in which actions have been entertained in the Courts of common law in the United States, but none in the admiralty, for injuries of this character. No case of this character in the Admiralty Courts of the United States was cited upon the argument, and it is believed that, aside from the English cases referred to, none can be found in the books. It is clearly a case of first impression, so far as any reported adjudicated cases in this country are concerned. May we not apply the language of Justice Nelson in the case of *The Plymouth* (3 Wall. 35-37), in regard to a similar dearth of reported cases in that case, and assume with him that the reason of it is, that the case "is outside the acknowledged limit of admiralty cognizance over marine torts, among which it has been sought to be classed," and that "the remedy for injury belongs to the courts of common law?"

There are, however, several reported adjudications of the Courts in this country from which we may derive aid in determining this question.

In the case of *The Plymouth* (3 Wall. 20), the packing-houses, for the loss of which by fire negligently communicated by a vessel lying at the wharf, a libel *in rem* had been filed, stood wholly upon the wharf, and the Supreme Court held that the damage done by their destruction was a damage done wholly on land (pages 33, 36), that the remedy belonged to the Courts

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of common law, and dismissed the libel. In that opinion the wharf is spoken of in the same connection with the buildings, and evidently as of the same character.

In the *Rock Island Bridge Case* (6 Wall. 213, 216), Justice Field, in delivering the opinion of the Court, makes use of the following language: "A maritime lien can only exist upon things which are the subjects of commerce on the high seas or navigable waters. It may arise with reference to vessels, steamers, and rafts, and upon goods and merchandise carried by them. But it cannot arise upon anything which is fixed and immovable, like a wharf, a bridge, or real estate of any kind. Though bridges and wharves may aid commerce by facilitating intercourse on land, or the discharge of cargoes, they are not in any sense the subjects of maritime lien." And why not? Clearly, because they are fixed and immovable—in fact, real estate—and are not the subjects of commerce on the high seas or navigable waters. They are, in fact, here spoken of as contradistinguished from such subjects. Not that they may not, in some sense, be subjects of commerce, but that they are not such on the waters, in the sense in which admiralty jurisdiction attaches. Being fixed and immovable—in fact, real estate—and not being subjects of commerce on the water, how can an injury to a wharf be said to be an injury done on the water? The place or locality of the injury is the place or locality of the thing injured, and not of the agent by which the injury is done (*The Plymouth, supra*).

In the case of the brig *Empire State* (1 Newb. 541), my predecessor, in an able opinion, held, and no doubt correctly, that a wharf built at the terminus of a street is but an extension of the street, and subject to the same easements, rights and liabilities of a street or public highway, and nothing more. So, by parity of reasoning, a wharf, constructed by an individual proprietor, is but an extension of the shore, and as such subject to the same rights and liabilities as any real estate, so far as trespasses or other torts upon it are concerned. It is for the convenience of commerce, it is true, but in the same sense any other improvement of the shore for the same purpose

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would be. In the case of the *Asa R. Swift* (1 Newb. 553, 554), the same learned judge says: "He" (the owner of a wharf) "is only a lessor for the time being of a part of his real estate, to be used as a moorage." No language can be plainer, and, I think, no conclusion sounder.

The case of *The Philadelphia, Wilmington & Baltimore Railroad Company v. The Philadelphia & Havre de Grace Tow-boat Company* (23 How. 209), was a libel *in personam* by the tow-boat company for an obstruction to navigation on navigable waters, an injury having resulted therefrom to one of the boats of the company. The obstruction was no part of a bridge, wharf, or any structure whatever. The spile had been driven there for engineering purposes in building a bridge. When work on the bridge ceased, its uses and purposes were at an end, and it was cut off below the surface of the water, and the stub was left standing, and became a simple obstruction to navigation, and nothing more nor less, the same to all intents and purposes as any obstruction to navigation without authority, right or legal purpose whatever (see p. 216). There the injury was done to the vessel on navigable waters. Here it was done to a fixed and permanent structure, real estate, and to all intents and purposes on the land, as held by the Supreme Court in the case of *The Plymouth* (cited *supra*). If the action in this case was against the wharf owners for an obstruction to navigation caused by their structure, and an injury resulting therefrom to a vessel, upon the water, it would be more nearly analogous to the case last cited from 23 How. But even then the two cases would not be alike, because in the one case the obstruction was no part of any structure whatever, for the purposes of commerce or otherwise, while in the other it is an improvement of the shore by extending it out over the water to aid and facilitate commerce.

Upon a careful consideration of the question, and of the authorities bearing upon it, I must hold that a wharf is but an improvement or extension of the shore; that it is real estate, and that an injury done to it, whether through negligence or design, no matter by what agency, is an injury done wholly on

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land and not on the water, and, therefore, does not constitute a marine tort. It necessarily follows that the remedy for such injury cannot be sought in the admiralty, but must be found in the Courts of common law.

Libel dismissed.

NOTE.—See *The Neil Cochran*, ante, p. 162.

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FEBRUARY, 1872.

BILL OF LADING.—VESSEL NOT LIABLE FOR STONE PURCHASED AS CARGO.

A document purporting on its face to be a bill of purchase by a vessel of certain stone, and signed by her master (the stone being delivered to her as cargo), has none of the elements of a bill of lading, and cannot be interpreted as such. Nor is the vessel holden for stone purchased by her master as cargo.

LIBEL for breach of contract of affreightment.

The libel alleged the shipping by libellant of a quantity of building and limestone on board the schooner at Marblehead, in the State of Ohio, on the 23d day of July, 1867, consigned to William Becker, of New Baltimore, in the State of Michigan, and that the libellant received “from the master of said schooner a bill of lading, a receipt and a contract whereby the said master charged the said vessel with the performance of said contract.” The libel further alleged a breach of the contract and a conversion of the stone by the master to his own use, and that the same was worth \$111 50, for which amount, with interest, the libellant claimed a decree against the vessel.

All the material allegations of the libel were denied by the answer; and it was averred that claimant became the purchaser

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of the schooner in good faith after such alleged contract and breach, and for a valuable consideration, and that libellant's claim, if he ever had any, had become stale by lapse of time, and ought not now to be enforced.

Mr. *H. B. Brown*, for libellant.

Mr. *W. A. Moore*, for claimant.

LONGYEAR, J. The shipping of the stone and the bill of lading and contract being denied, it was incumbent on the libellant to sustain the same by a preponderance of proof. The libellant Conrad was sworn as a witness, and after testifying to the shipping or placing on board the schooner a load of stone, produced as and for the "bill of lading, receipt and contract" mentioned in the libel the following document:

"MARBLEHEAD ISLAND, O., July 23, 1867.
Schooner Skylark, of New Baltimore,
Bought of Michael Groh & Co.,
Dealer in
Building, Blockstone and Limestone.
To W. Becker.
25 cords lime and building stone.
16 cords of building stone, \$5 not paid, amount to... \$80 00
And \$3 50 for limestone..... 31 50
9 cords limestone.....\$111 00
(Signed,) PORTER CHORTIE."

This document is partly printed and partly written, and the written portion bears upon its face strong evidence of having been written at different times. The words "to W. Becker" (inserted in the manner above indicated), in pencil, especially have that appearance. It is due, however, to Conrad to state that he testified that those words were there when Chortie signed it.

But this paper bears no resemblance to and contains none of the elements of a bill of lading or contract of affreightment.

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It is quite unnecessary to specify what it lacks, because it lacks everything going to make up such a document. It is not even signed by Chortie as master, although it was proven that he was master and owner of the schooner at the time. It is simply an acknowledgment by Chortie, in plain and explicit terms, that he had bought the stone of libellant at the prices named, and that the same was not paid for. It is true that Conrad testified that they usually took their bills of lading in that form, although he produced none, but even if that is so, it does not make it a bill of lading, or entitle libellant to use it as such for any purpose whatever. And then what he said to Warwick, the claimant, as testified to by the latter, that he had sold a load of stone to Chortie, and that he must have his pay for it from Chortie or from Warwick, is consistent with the document as it reads, and is therefore entitled to much weight. And the circumstance that libellant did not send a bill of lading or any notification whatever to the person to whom it is now claimed the stone was shipped, taken in connection with the fact testified to by that person, that he had not ordered the stone, is utterly inconsistent with the idea that the transaction was considered a shipment as freight at the time.

To my mind it looks very much like this, that the transaction was a sale of the stone to Chortie, and that the libellant supposed that by making out the bill of sale to the schooner by name and obtaining the signature of Chortie, the master and owner at the time, the vessel would be holden for the purchase price; but having ascertained that no such result would follow, he now seeks a change of base by treating the transaction as one of affreightment. This, of course, cannot be allowed to be done. The preponderance of proof, instead of being in favor of the libellant, I think is largely against him.

Libel dismissed.

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FEBRUARY, 1872.

**SALVAGE.—SPECIAL CONTRACT FOR PROPORTION OF PROPERTY SAVED.
—HOW FAR A SALVOR IS AN AGENT OF THE OWNER.**

A wrecking company which had undertaken to raise a sunken schooner and deliver her at Detroit for six-tenths of her value when so delivered, hired of libellant, for a fixed compensation, certain divers, diving armor, and wrecking apparatus. *Held*, that libellant, having knowledge of the contract between the wrecking company and the owners of the schooner, could not maintain a libel *in rem*, and that the subsequent ownership of six-tenths of the schooner by the wrecking company could not relate back to the time of its contract with the owners, so as to affect their interests.

A salvor by contract is not an agent of the owners, and cannot create against them or the property saved, any liability beyond the contract price.

|| A contract for a compensation to be paid at all events, whether the property is saved or not, creates a mere personal obligation, and no lien attaches on account of it.

THE Marquette was sunk in the Straits of Mackinaw by a collision, and abandoned by her owners to the underwriters, and there lay sunken in about fifteen fathoms of water. The underwriters contracted with the Northwestern Wrecking Company, a corporation organized under the laws of Ohio for the raising of sunken vessels, to raise the Marquette, and place her in Clark's dry dock, in the city of Detroit, for six-tenths of the vessel. The Northwestern Wrecking Company entered upon the performance of their contract under the charge and supervision of Milo Osborne, and after working at the wreck for several days, found that on account of the great depth of water in which the wreck lay, the services of a diver were necessary. The libellant, who was also in the wrecking business, was then engaged in raising a wreck in Beaver Harbor, near Beaver Island, a few miles distant from the wreck of the Marquette. He had divers in his employ, and owned and had in use the necessary diving armor and apparatus, a hand pump, a

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steam pump, etc., adapted to the purposes of wrecking. He was also the patentee of a new invention for raising sunken vessels, which consisted mainly in sinking casks filled with water, and then, after being fastened to the vessel, inflating them with air by the use of a steam pump and connecting tubes or pipes, and thus expelling the water and giving the casks a lifting power. Osborne, who was in charge of the work for the Northwestern Wrecking Company, applied to and obtained of the libellant a diver and the necessary armor and apparatus, including a hand pump. After working a short time it was found that the hand pump was not sufficient for the divers to operate with safety in so great a depth of water, and Osborne returned the hand pump and obtained libellant's steam pump. After working a few days longer, and not making much progress, Osborne returned to libellant with the diver, apparatus and pump, and had a settlement with him up to that time, and paid libellant what was then found to be his due, at the rate of \$50 per day with the hand pump, and \$75 per day with the steam pump, less a small deduction made by libellant at the request of Osborne. Osborne desired the use of the diver, etc., longer, but complained that they could not afford it at the price charged by libellant. A new arrangement was then entered into, and Osborne returned to the Marquette, with two divers who were in the employ of the libellant, the necessary armor and apparatus, and the steam pump, and taking with him, also, some of libellant's casks, to be used on his patented plan, and had the same for use in raising the wreck, thirty-four consecutive days, and until the vessel was finally raised. The divers, etc., were actually used twenty-eight, and were idle six out of the thirty-four days. It is for this use, under the new arrangement, that the libellant brought this suit against the vessel.

During this time the libellant came along where the company were at work, on his way to Cleveland, with the vessel he had been raising, and left a small vessel called the Barbour, and his chains, anchors, additional casks, etc., and the same were used by the company to some extent, but no additional

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claim is made for such use. On the Marquette being raised, she was taken to Detroit by the Northwestern Wrecking Company, and placed in Clark's dry dock, in complete fulfillment of their contract with the underwriters, and its interest of six-tenths in the vessel, her boats, etc., thereupon accrued to them, and the company intervened, and put in its claim and answer for the protection of that interest.

Mr. W. A. Moore, for libellant.

Where a lien has been created it will not be released except upon the clearest proof of an intention to release it (*The Steamboat Fashion*, Newb. 49; *The Kimball*, 3 Wall. 37; *Peyroux v. Howard*, 7 Pet. 325, 345; *The A. D. Patchin*, 1 Blatch. 414; *Dike v. The St. Joseph*, 6 McLean, 573).

Failure to prosecute by one set of salvors does not inure to the benefit of the salvors who do prosecute, but to the owners (*The Ship Charles*, Newb. 329).

Mr. H. B. Brown, for claimant.

It is unnecessary to consider whether if libellant's contract had been made directly with the owners for a sum certain, he could sustain a lien. He certainly could have no claim for salvage *as such*, for that is a contingent claim, and some of the cases would indicate he could have no lien upon the vessel (*The Mulgrave*, 2 Hagg. 77; *The Independence*, 2 Curtis, 350; *The Island City*, 1 Cliff. 210; *Bondies v. Sherwood*, 22 How. 214; *Adams v. The Susan*, 1 Sprague, 499; *The Versailles*, 1 Curtis, 353).

Libellant was a subcontractor, and clearly had no lien (*Purinton v. Hull of New Ship*, Ware, 556, 561; *Smith v. The Steamer Eastern Railroad*, 1 Curtis, 253; *Southwick v. The Clyde*, 6 Blackf. 148; *Hubbell v. Denison*, 20 Wend. 181; *Burst v. Jackson*, 10 Barb. 219; *The Whitaker*, 1 Sprague, 229, 282; *Harper v. Hull of New Brig*, Gilpin, 536; *Ames v. Swett*, 33 Maine, 479; *Squire v. One Hundred Tons of Iron*, 2 Ben. 21).

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LONGYEAR, J. The libellant and Osborne, both of whom were sworn as witnesses and testified in the case, agree that the divers were in the employ of the libellant, and that he was to be paid for their services, as well as for the use of the armor, apparatus, pump, etc. They also agree that libellant's compensation was not dependent upon success, but that he was to be paid at all events, whether the vessel was raised or not. It is true they do not say this in so many words, but the version which each gives of what the contract was under the new arrangement, admits of no other construction. They are also agreed as to the time, viz., thirty-four days, and that twenty-eight of those were working days, and six of them they were idle. The main facts upon which there is any disagreement are as to whether there was a fixed rate of compensation agreed upon, or whether it was left to a *quantum meruit*, and as to whether the libellant knew or was informed of the character or capacity in which the company was operating, that is, that they were operating as contractors, and not as owners.

The libellant claims that the rate of compensation agreed upon was \$75 per day when working, and half price, or \$37 50, per day when idle. On this basis he claims as follows:

28 working days at \$75.....	\$2,100
6 idle " " 37 50.....	225
Total.....	\$2,325
Less payment conceded.....	310
Leaving a balance of.....	\$2,015

for which, with interest from October 1st, 1870, libellant claims a decree in his favor against the vessel. On the other hand, the company claims that no fixed rate of compensation was agreed upon, but, on the contrary, that when Osborne complained that they could not afford to pay \$75 per day, libellant told him to take the divers, etc., and use them, and he would be reasonable with them, or words to that effect, and that that was the agreement as to compensation. But, without pursuing this disputed point further now, I will proceed to the

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other disputed fact. And here I must hold that libellant had notice of the character or capacity in which the company was operating. Libellant, in his testimony, says, "I understood the Northwestern Wrecking Company had taken the job to raise the vessel, and had failed. I did not know how much they had taken the job for." He understood, then, that the company was not operating as owner, but had undertaken the raising of the vessel as a "job," and the only point as to which he professes not to have been informed was how much they were to receive for the service. This is sufficient alone to settle this point. But there is further testimony which I think places it beyond all doubt that libellant knew, not only that the company was operating as contractor, but also the terms of the contract. Osborne, after producing in evidence the contract (which was in writing) between the Northwestern Wrecking Company and the underwriters, testifies positively and explicitly as follows: "I made known to Captain Falcon that we had such a contract; that I deemed it a good one, and that I wished him to go in with me and share in the results, etc. That was at the time we were at Beaver Harbor. He replied that *he wanted nothing to do with the wreck—that he wanted the money*. He said they were slow things to realize from. I told him we were to have six-tenths, and that she ought to be raised in a very short time—we deemed it a good contract." In this Osborne is not contradicted. On the libellant being recalled to the witness stand, and asked if any such conversation took place, says, "none that I recollect;" and this is all the denial he makes, which in fact is no denial.

But it is contended, on behalf of libellant, that the Northwestern Wrecking Company were in fact part owners of the vessel to the extent of the six-tenths which they were to have under their contract with the underwriters, in case of success, and which finally accrued to it. I cannot agree to this. The company was operating precisely the same as any salvors under a contract, and the agreement as to the six-tenths was simply fixing the *quantum* of compensation, in lieu of leaving it for after consideration between the parties, or to be determined by

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the court. Besides that, it was wholly conditional upon success, and it accrued to it only from the time the contract was fully performed. By no known principle of law or in reason can it be held to relate back to any previous period so as to affect the interests of those who were owners of the vessel at the time the contract was entered into. The company must therefore be held to have sustained the relation of contractor merely at the time the agreement between libellant and Osborne was entered into.

The case, then, is that of a person having rendered a service to salvors for a compensation to be paid at all events, who were themselves operating under a contract with the owners, known to such person, claiming and seeking to enforce a lien upon the vessel saved, independently and irrespectively of such latter contract, and of the compensation as fixed by it.

The learned advocate for the libellant has referred the Court to no adjudicated case in which this was allowed to be done, and to no authority or even *dictum* to that effect; and after a careful investigation, the Court has been able to find none. On the contrary, the authorities are all the other way. The case of *The Whitaker* (Sprague's Decision, 229, and same case at page 282), and that of *Squire v. One Hundred Tons of Iron* (2 Benedict, 21), are quite analogous to the present case. Both cases were in fact more favorable to the libellant than the present. In the case of *The Whitaker*, Holbrook, the original contractor, after vain efforts to get the vessel off, gave the job over entirely to one Otis, who knew of the contract. Otis, at an expense largely beyond the contract price, succeeded in getting the vessel off, and then libeled her for his pay. Judge Sprague dismissed the libel, for the reason that Holbrook, the original contractor, was not made a party. Afterwards, upon a new libel, in which Holbrook was joined, the Court granted a decree to Holbrook and Otis, jointly, limiting them to the original contract price, although it was less than half what Otis had expended. In that case also Otis' compensation was dependent upon success, while in the present case, as we have seen, libellant was to be compensated at all events.

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In the case of One Hundred Tons of Iron, libellant had loaned to the owners seven large blocks, to be used by them in endeavoring to get their vessel off the beach, at \$5 per day, with an express stipulation that the vessel should be responsible for hire and damage and for the return of the blocks. The hire not having been paid, and the blocks having been lost, libellant brought his suit, *in rem*, against 100 tons of iron which was of the cargo, and had been recovered from the vessel. Judge Blatchford dismissed the libel, not only on the ground that a pledging of the vessel was not a pledging of the cargo, but mainly on the broad ground that the libellant had no claim whatever as a salvor, giving as a reason that the hire of the blocks was for a fixed compensation, which was to be paid at all events, whether the vessel was saved or not, which is exactly the present case, according to the libellant's own theory. In that case also, it is to be observed, the contract was made with the master of the vessel, and it purported to pledge the vessel for its fulfillment, and yet the Court held that the libellant could not recover in the admiralty, either *in rem* or *in personam*. In this case, not only was the contract not made with master or owner, but the libellant expressly refused to have anything to do with the wreck.

I think both of these cases are sustained by authority, as well as on principle. The case of *The Whitaker* was decided on the principle that a salvor by contract, like the Northwestern Wrecking Company in this case, is not an agent for the owners, and cannot create against the owners or the property saved any obligation or liability beyond the contract price, or, it may be added as applicable to this case, a different mode of payment than that expressed in the contract; and I think there can be no dispute as to the soundness of that doctrine. The most that the Court could do, in any event, would be to let the libellant in to share the contract price with the original contractor. But the Court cannot do that in this case without making a new contract for the parties, because, as we have seen, libellant expressly refused to share the contract price or have anything to

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do with the wreck at the time the agreement between him and the company was made.

The case of One Hundred Tons of Iron was decided on the principle that the hiring, as in the present case, was for a compensation to be paid at all events, whether the vessel was saved or not. The same principle was also stated and acted on by Judge Sprague in the case of *The Whitaker* in deciding another branch of the case than that above alluded to. See, also, *The Independence* (2 Curtis, 350, 355), where the same doctrine is enunciated by Judge Curtis in the following language: "In my judgment, a contract to be paid at all events, either a sum certain, or a reasonable sum, for work, labor, and the hire of a steamer or other vessel in attempting to relieve a vessel in distress, without regard to the success or failure of the efforts thus procured, is inconsistent with a claim for salvage; and when such a contract has been fairly made, it must be held binding by a Court of Admiralty, and any claim for salvage disallowed" (see, also, *The Camanche*, 8 Wall. 448, 477).

It must be understood that the nature of the claim as a salvage claim is not changed simply because the service was rendered by contract. It is well settled that the nature of the service as a salvage service is not changed for that reason alone (see the opinion of the Court in the case of *The Silver Spray's Boilers*, ante, p. 349, decided by this Court at the present term, and the cases there cited). It is because that by the contract the compensation is to be paid at all events, whether the property is saved or not, that a claim for salvage cannot be maintained. Such a contract creates a mere personal obligation, and no lien attaches on account of it.

I hold, therefore, that the libellant in this case cannot maintain a suit *in rem* in this Court, for the reasons: 1st. That the services having been rendered under an agreement with a contractor itself operating for a specific compensation, and not with the master or owner of the vessel, he cannot, in any event, maintain a suit against the vessel, except by joining with such original contractor and sharing with it the compensation so

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agreed upon between it and the owners. 2d. That he could not maintain such suit in this case, because, by the very terms of his agreement, he was not so to share. 3d. That he was to be paid at all events, whether the vessel was saved or not. The libellant undoubtedly has a remedy against the Northwestern Wrecking Company in some form of action, but not in this.

Having arrived at these conclusions, it is unnecessary to determine the specific compensation the libellant was to receive, whether a *per diem*, or a *quantum meruit*, or how much. The libel must be dismissed, with costs; but, inasmuch as the merits of the case as between the libellant and the Northwestern Wrecking Company are not decided, it must be without prejudice as between them.

Libel dismissed.

NOTE.—See *The Williams*, ante, p. 208.

THE SENATOR.

MARCH, 1872.

SALVAGE IN CASE OF APPARENT DERELICT.—LIABILITY OF SALVORS
FOR NEGLIGENCE.

A vessel and cargo, valued at \$5,000, were found in Lake Erie, waterlogged, abandoned, and apparently, though not in fact derelict. A portion of her cargo was taken off and put upon the salving vessel, a steam barge, by which she was towed to a place of safety, the whole time occupied by the service being six hours. *Held*, that, under the circumstances, \$75 was a proper salvage compensation.

Salvors are liable for damage done to the sails of the vessel saved by being negligently left exposed to sparks from the salving vessel.

LIBEL for salvage.

The scow Senator was bound on a voyage from Saginaw to Toledo, with a cargo of lumber. Having encoun-

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tered a storm, she was found, on the night of the 22d of April, 1869, to be leaking. When she had arrived off Monroe light, and some five to seven miles distant from it, she became so waterlogged that she could not proceed. She then, as testified by her master and crew, came to an anchor, and the master went ashore at Monroe in quest of a tug to tow the vessel to Toledo. Finding no tug at Monroe, he telegraphed to Toledo for one. The entire crew of the vessel left and went on shore with the master, for the reason that they had but one boat, and it was deemed unsafe to remain on board the vessel in her then condition, without a boat to make their escape if necessary.

Libellant's vessel, the steam barge Mayflower, bound up from Toledo, made the Senator at about 10 o'clock in the forenoon of the next day, and, on coming up to her, found that a considerable portion of the top of her load of lumber had slid over to one side, causing the vessel to careen considerably, and the lumber was gradually sliding off into the water with each roll of the vessel, and floating away. Finding no one on board, the master of the Mayflower at once set about gathering up the floating lumber, and also transferring lumber from the Senator to his vessel, which he continued to do until he had so gathered up and transferred about 5,000 feet, when the Senator became so relieved that she righted. The master of the Mayflower, finding that the rudder of the Senator was broken, or unshipped, so that she could not be towed astern, lashed her alongside his vessel, and started with her for Monroe harbor. On reaching shoal water, near the harbor, the Senator, from the amount of water she drew on account of her waterlogged condition, brought up on the bottom. At about this time, or very soon after, the master of the Senator came aboard and claimed the vessel and cargo, and thereupon the lumber which had been taken on board the Mayflower was transferred back to the Senator by the Mayflower's crew. The masters of the two vessels had some conversation about settling for the services of the Mayflower, but did not agree as to the amount, and no settlement was had. The Senator was then left in possession of her

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own master, and the Mayflower went to Monroe. This was about 4 o'clock in the afternoon. Soon after the Mayflower left, the tug, which had been telegraphed for, arrived from Toledo, took the Senator in tow, and towed her to Toledo, where she arrived some time in the night.

Mr. *W. A. Moore*, for libellant.

Mr. *H. B. Brown*, for claimant.

LONGYEAR, J. The only question in this case is as to the amount the libellants ought to receive. Claims for salvage services are among the most meritorious known to the admiralty, and hence are viewed with favor. Such services are to be encouraged, and although the degrees of merit vary widely in different cases, yet in no case should the allowance be so small as to operate as a discouragement. The amount to be allowed, however, depends entirely upon the peculiar circumstances of each case; and while it should not be made so small as to operate as a discouragement to like efforts in the future, on the one hand, it should not be made so large as to operate oppressively to owners on the other. These remarks are especially applicable to a case like the present, where the property saved or aided was not derelict.

There is some conflict between the testimony of the crews of the respective vessels as to whether the Senator was actually at anchor when discovered by the Mayflower; but I think there is a clear preponderance of proof that she was at anchor. Although the wind was blowing quite briskly from the land, and the swells were considerable from the effects of the then recent storm, and there were islands a few miles to leeward upon which the vessel might drift if she were to break from her moorings or drag her anchor, yet there does not appear to have been any imminent danger of her going to pieces, breaking from her mooring, or dragging her anchor, and from the buoyancy of her cargo there was no immediate danger of her sinking.

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The cargo, however, was actually escaping, and was liable to the loss of a considerable portion of it; the weather was unsettled, and the storm might be renewed at any moment, endangering a total loss of vessel and cargo; and there being no one on board, she was, considering the distance from land, *prima facie* abandoned and derelict. It was therefore highly proper for the master of the Mayflower to do as he did—save the cargo from loss, which was then actually taking place, and to take vessel and cargo to a place of safety. In other words, the vessel and cargo were in a condition to have a salvage service performed. I think Mr. Parsons lays down the rule correctly when he says: "If a ship or property be left, though not derelict, one who in good faith takes possession as salvor, is not a trespasser, but has his reasonable claim for salvage, according to the good he actually does" (2 Pars. Sh. and Adm. 283, 291; see, also, *Talbot v. Seeman*, 1 Cranch, 1).

There are not, however, in this case any of those elements which lie at the foundation of large compensation to salvors, such as peril to life, or even of great hardships and dangers to the salvors, or to the safety of the salving vessel; no detention from any voyage, nor detention of freight on the part of the salving vessel; and not so far from shore but safety from storm could be sought at any time. Add to this the fact that the vessel was not in fact abandoned, but that succor had been applied for and was even then on the way, and arrived so soon that no great additional loss could have occurred beyond a few thousand feet of lumber, and I think libellants fail to make out a case for compensation much beyond what would be full, liberal pay for the time, work and labor actually spent and performed. I think, however, that something beyond mere compensation ought to be allowed, in consideration of the fact that a portion of the cargo was actually saved which would evidently have been otherwise lost, and also that efforts of this kind, when made in good faith, as they were undoubtedly in this case, ought to be encouraged.

In this case the time actually spent was about six hours. The proof shows the value of the services of the Mayflower

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and her crew, on ordinary occasions, to have been \$10 per hour. Although, in cases of the peculiar circumstances like the present, salvage is seldom, if ever, awarded at a percentage or proportion of the value of the property saved or benefited, yet value very properly has its influence in fixing the amount. In this case the value of the vessel and cargo was about \$5,000, that of the vessel being \$3,500, and that of the cargo \$1,500.

Under all the circumstances of the case, I think \$75 is a fair salvage compensation. From this, however, must be deducted \$10 for damage done to the sails of the Senator by burning, in consequence of being negligently left exposed to the sparks from the Mayflower while towing the Senator alongside.

Decree for libellants for \$65 and costs.

NOTE.—See *The C. S. Butler*, 2 Asp. Mar. Law Cases, 237.

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APRIL, 1872.

DAMAGES BY COLLISION.—DEMURRAGE BASED UPON PROBABLE EARNINGS.

In the absence of a market value for the use of vessels, the value of such use to the owner, in the business in which she was engaged at the time of the collision, is a proper basis for estimating damages for detention.

The books of the owner, showing previous and subsequent earnings, are competent evidence of the probable earnings during the detention.

The party in fault should bear whatever inconvenience or hardship there may be in proving the exact amount of damages sustained.

In cases of conflicting testimony as to amounts, where the preponderance is not palpable, the finding of the commissioner will not be disturbed.

The services of an agent employed in settling and paying bills is not a proper item of damages.

Estimates of the cost of repairs, though competent in absence of better evidence, are not so where the repairs have been actually made.

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ON exceptions to commissioner's report of damages.

The propeller Mayflower was adjudged to be in fault in a collision with the steamer Dove, and it was referred to a commissioner to ascertain the damages done to the Dove by the collision. The commissioner having made his report, both parties came in and excepted to it in several particulars. The exceptions are stated in the opinion of the Court.

Messrs. *H. B. Brown* and *W. A. Moore*, for libellant.

The allowance of damages for detention is settled by repeated adjudications (1 Pars. on Ship. 538; *The Gazelle*, 2 W. Rob. 279; *Williamson v. Barrett*, 13 How. 101; s. c. 4 McLean, 589; *Sturgis v. Clough*, 1 Wall. 269; *The Cayuga*, 7 Blatch. 385; *The State Rights*, Crabbe, 49; *The Rhode Island*, Olcott, 505; *The Lake*, 2 Wall. Jr. 52; *The Fashion*, Ibid. 345; *The Rhode Island*, Abb. Adm. 100; *The Narragansett*, 1 Blatch. 211, 217; *The Apollon*, 9 Wheat. 362, 377; *McKnight v. Ratcliff*, 44 Penn. 156; *Jolly v. Terre Haute Co.* 6 McLean, 237; *Lacour v. The Mayor*, 3 Duer, 406; *Marquart v. La Farge*, 5 Duer, 559; *St. John v. Mayor*, 6 Duer, 315; *Borries v. Hutchinson*, 18 C. B. (N. S.) 466 a; *Allison v. Chandler*, 11 Mich. 542; *Walter v. Post*, 6 Duer, 363, 373; *Steamboat Co. v. Vanderbilt*, 16 Conn. 420; *R. R. Co. v. Lewark*, 4 Ind. 471; *Sewall's Falls Bridge v. Fisk*, 3 Fost. 171; *Griffin v. Colver*, 16 N. Y. 489; *Wilkes v. Hungerford*, 2 Bing. N. C. 287; *The Empire State*, 2 Ben. 178; *The R. L. Mabey*, 4 Blatch. 439; *The Santee*, 6 Blatch. 1).

Although the amount paid the Eighth Ohio seems large, yet if ordinary prudence was exercised in hiring her at this price, and the money was actually paid by the insurance company, libellant is entitled to recover it. To prove that each bill was reasonable might be impossible, and involve an endless number of issues. We are simply required to prove that we paid them in good faith, in the exercise of ordinary prudence, and without fraud or collusion (*The Nebraska*, 3 Ben. 261; *The Thos. Kiley*, Ibid. 228).

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Messrs. *F. H. Canfield* and *G. V. N. Lothrop*, for claimant.

The evidence does not justify the allowance of demurrage. No market value is shown for the use of such a vessel. The opinions of experts are not admissible, as they are based upon the probable earnings or profits (*The Amiable Nancy*, 3 Wheat. 546; *Steamboat Co. v. Whillden*, 4 Harrington, 228; *The Clarence*, 3 W. Rob. 283; *Cummings v. Spruance*, 4 Harr. 315; *Blanchard v. Ely*, 21 Wend. 342; *Boyd v. Brown*, 17 Pick. 461; *Benson v. Malden Gas Co.* 6 Allen, 149; *Mining Co. v. Clark*, 32 Mo. 305; *Taylor v. Maguire*, 12 Mo. 317; *Schooner Lively*, 1 Gall. 315).

To estimate her rental value upon her probable profits would be, in effect, to allow the owners of the *Dove* to recover those profits as damages (*The Granite State*, 3 Wall. 310; *The Baltimore*, 8 Wall. 386; *The Blossom*, Olcott, 194).

The facts in the case of *The Cayuga* are very different from those proven in this case, and whether rightly decided or not, it is no authority here.

LONGYEAR, J. The most important of the exceptions, as well in amount as in the principles involved, are respondent's ninth exception, which is to the item allowed by the commissioner for demurrage, 28 days at \$100 per day, \$2,800, and respondent's eleventh exception, which is to the item allowed for value of services of steamer *Eighth Ohio*, 11 days at \$100 per day, \$1,100; and libellant's third exception relating to the latter item, which is that the commissioners reduced the claim for services for the steamer *Eighth Ohio*, it being claimed that a larger amount was actually paid. These exceptions will be first considered.

1. As to the item for demurrage. The River and Lake Shore Steamboat Line, the libellant corporation, was, among other things, running a line of steamboats between Detroit and Port Huron during the season of 1869, for carrying passengers and freight. The *Dove* was owned by libellant, and was running on that line, making daily trips from Detroit to

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Port Huron and back, at the time of the collision. The collision occurred on the night of the 31st day of May, 1869. The Dove was sunken by the collision, was raised and brought to Detroit, placed in dry dock and repaired, and resumed her place in the line and commenced running again on the 28th day of June, 1869. The time she was so detained from her regular trips was necessarily occupied in raising and repairing her. During her detention her place in the line was supplied by other boats belonging to libellant.

Thus far there is no dispute as to the facts. Neither is it disputed as a proposition of law (and, in fact, the law in this regard is too well established to admit of question) that libellant is entitled to recover damages for the detention, or, as it is commonly called, demurrage. The question in dispute is as to the proper basis or measure of damages. On behalf of respondent it is contended that, in a case like the present, the rental or charter value alone is the proper basis, and because it appears by the evidence before the commissioner that at the port of Detroit, the home port of the Dove, there was no established rental or charter value of vessels like the Dove, and because it does not appear that she could have been chartered during the time of her detention, there is no basis for recovery of damages as demurrage; and that the most that libellant can recover is interest on the value of the vessel during the detention.

On behalf of the libellants it is contended that, because there was no established rental or charter value by which to ascertain the damages for the detention, and, at all events, because libellant did not keep the Dove for hire, but for libellant's own use and service in the business and employment for which she was intended, and in which she was then engaged, the value of such use and service to libellant in that particular business and employment, under the maxim *restitutio in integrum*, always applied in such cases, is the proper basis and measure of damages for the detention; provided, of course, that such value is susceptible of proof, and is proven, to a reasonable certainty.

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In reply to this, it is contended, on behalf of respondent, that the proof of such value must of necessity be based, as it is in fact in this case, upon probable profits of such service during the detention; and that such basis is excluded by express authority.

To support the propositions contended for on behalf of respondent, the case of *Smith v. Condry* (1 How. 28), and *Williamson v. Barrett* (13 How. 101), are cited. The first named case is cited as an express decision of the Supreme Court excluding future profits as a basis or measure of damages for demurrage, and the last named case as a like decision establishing and limiting the rule of damages in such cases to include the market rental or charter value only, and that where there is no such value established, there can be no damages for detention allowed. These cases have been sometimes misapprehended by learned commentators, and to some extent by the learned advocates on both sides in this case. Mr. Conkling (1 U. S. Adm. 384), and Mr. Parsons (1 Sh. & Adm. 540, note 1), both assume that *Smith v. Condry* (which was decided in 1843) decides that the probable profits of the earnings of the vessel during the detention are not allowable as demurrage; and that *Williamson v. Barrett* (which was decided in 1851) decides that such profits are allowable, and thus subverts the former decision and establishes a different rule. As we shall presently see, these are misapprehensions, and that in neither case was the decision what is thus assumed. The questions presented in the two cases were entirely different, and the decisions are in no manner in conflict with each other. What was decided in each case remains the law to-day, unimpaired and unqualified by any subsequent rulings of that Court.

In *Smith v. Condry*, the vessel detained was laden with salt, and the damages claimed were for a loss or diminution of profits on the cargo, in consequence of a decline in the price of salt at the port of destination during the detention. The Court held that such damages were not allowable, and that is all the Court decided. Such damages were clearly speculative merely, and too remote. The decision of the Court excluding

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such damages was in accordance with what I understand to have been the uniform course of decision of the Courts in England and America, both before and since, and it is undoubtedly the law to-day. But the Court made no decision in that case as to damages for the *delay of the vessel*—whether such damages are or are not allowable—nor whether the *probable earnings* of the vessel during her detention, by way of freights, hiring or otherwise, are or are not allowable. No such question was before the Court, and no rule whatever was laid down as to it. All that the Court decided was that probable profits on the cargo, which might have been made but for the delay, are not allowable. When the Court say (chap. 35): “It is the actual damage sustained by the party at the time and place of the injury that is the measure of damages,” they are speaking of the case before them—a claim for probable profits on the cargo—and not of the detention of the vessel and damages resulting from loss of her use and service as such. The case of *Smith v. Condry*, therefore, does not reach the present question.

In *Williamson v. Barrett*, the general question of damages for loss of the use of vessel during the detention, was directly before the Court. That was an action at common law, for damages by collision on the Ohio river. On the trial in the Circuit Court the jury were instructed, among other things, to give damages for “the use of the boat during the time necessary to make the repairs and fit her for business.” The evidence given to support this claim for damages is not stated, and it does not appear upon what basis the claim was made—whether for rental or charter value or otherwise. The Supreme Court, however, after reciting the instruction, say: “By the use of the boat, we understand what she would produce to the plaintiffs by the hiring or chartering of her to run upon the river in the business in which she had been usually engaged.” The Court then, after announcing the general rule regulating damages in cases of collision to be the allowance of the injured party of an indemnity to the extent of the loss sustained, and after some discussion in regard to the difficulty in stating the

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grounds upon which to arrive, in all cases, at the proper measure of that indemnity, and having arrived at the conclusion that the demand in the market for vessels of the description of the one disabled, and the price which the owner could obtain, or might have obtained, for her hire, are proper bases of compensation, proceed as follows: "If there is no demand for the employment, and of course no hire to be obtained, no compensation for the detention during the repairs will be allowed, as no loss would be sustained. But if it can be shown that the vessel might have been chartered during the period of the repairs, it is impossible to deny that the owner has not lost, in consequence of the damage, the amount which she might have thus earned. The market price, therefore, of the hire of the vessel, applied as a test of the value of the service will be, if not as certain as in the case where she is under a charter party, at least, so certain that, for all practical purposes in the administration of justice, no substantial distinction can be made." The point, and the only point actually decided in that case, is that damages for the detention are allowable, notwithstanding the vessel injured was not under a charter party at the time of the injury, provided it is shown that she might have been chartered during the detention. That is to say, that it is not indispensable to the recovery of damages for demurrage that the injured vessel should have been under a charter party at the time of the injury. What the Court say in deciding this point, as to what is a proper measure or basis of damages in such a case, must be read and understood with reference to what they say they understood by the "use" of the boat, as that word was used in the charge to the jury, viz., "what she would produce to the plaintiffs by the hiring or chartering of her." What I understand the Court to say is, that in that case, and under the general signification of the expression "use of the boat," as understood by them, a proper rule of damages is the rental or charter value of the vessel. I do not understand the Court to lay this down as an inflexible and universal rule, applicable alike to all cases where the vessel injured is not actually under a charter party at the time of the collision. In

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fact, the contrary appears in the course of the opinion of the Court. At page 111, the Court cite approvingly the decision of Dr. Lushington in the case of the *Gazelle* (2 W. Rob. 279), in which the freight the injured vessel was earning at the time of the collision, less the probable expenses in earning it, was adopted as the measure of damages for the detention. In citing this opinion, the Supreme Court remark: "This rule may afford a very fair indemnity in cases where the repairs are completed within the period usually occupied in the voyage in which the freight is to be earned. But if a longer period is required, it obviously falls short of an adequate allowance. Neither will it apply where the vessel is not engaged in earning freight at the time. The principle, however, governing the Court in adopting the freight which the vessel was in the act of earning as a just measure of compensation in the case, is one of general application. It looks to the capacity of the vessel to earn freight for the benefit of the owner, and consequent loss sustained while deprived of her service. In other words, to the amount she would earn him on hire." And it was so understood (as not fixing an inflexible rule), by Mr. Justice Catron, in his dissenting opinion. On page 114, he says: "The supposition that the amount of damages can be easily fixed, by proof of what the injured boat could have been hired for on a charter party, during her detention, will turn out to be a barren theory, as no general practice of chartering steamboats is known on the western rivers, nor can it ever exist; the nature of the vessels and the contingencies of navigation being opposed to it. In most cases," he says, "the proof will be that the boat could not have found any one to hire her; and then the contending parties will be thrown on the contingency, whether she could have earned something, or nothing, little or much, in the hands of her owner during the time she was necessarily detained." Here the learned judge describes exactly the contingency which exists in the present case; and it is because the decision of the majority of the Court is, in his opinion, capable of being extended to cover such a contingency, that he dissents.

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The rule that the party injured is entitled to an adequate compensation for any loss he may sustain for the detention of the vessel, is fully recognized and broadly stated in the opinion of the Court. But what would be the proper mode of arriving at such compensation, in cases where the vessel at the time of the injury was not earning freight, not under a charter party, and no demand for the hiring of vessels, and no use for them, except by the owner, and therefore no market rental or charter value (as in the present case), is not discussed or decided. The principle upon which compensation is awarded for marine torts, enunciated in this case as well as in others, especially in *The Gazelle* (2 W. Rob. 279); *The Clarence* (3 W. Rob. 283), and other English cases, is broad enough to cover all such cases as those above enumerated, and they are clearly not excluded by any rule laid down in *Williamson v. Barrett*, nor in any other case I have examined, and I have examined all the numerous cases cited in the briefs of counsel, and some others. If actual loss on account of the detention is made to appear, the case is within the principle, and damages are recoverable. It then only remains to prove the amount. In *The Clarence* (3 W. Rob. 283), the whole doctrine is very clearly stated. In that case there was no proof of any actual loss, and the Court (p. 286), says: "In order to entitle a party to be indemnified for what is termed in this Court a consequential loss, being for the detention of his vessel, two things are absolutely necessary—actual loss and reasonable proof of the amount. Both must be proved," &c. And again, "It does not follow, as a matter of necessity, that anything is due for the detention of a vessel whilst under repair. Under some circumstances, undoubtedly, such a consequence will follow, as for example, where a fishing voyage is lost, or *where the vessel would have been beneficially employed.*" And again, "The *onus* of proving her loss rests with the plaintiff, and this *onus* has not been discharged upon the present occasion. *Had the owners of the Clarence proved that the vessel would have earned freight, and that such freight was lost by the collision, the case would have fallen within the principle to which I have last adverted.*"

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Under that rule, I think that the loss of earnings during detention is clearly allowable; and this, although not actually earning freight at the time of the injury, nor kept for hire, nor under a charter party, nor any market rental or charter value of vessels of like character, nor any demand for the hire of such vessels, provided it is proven to a reasonable certainty that the vessel would have been actually employed by the owner during such detention, and that she would actually have earned the owner something over and above her expenses. What is meant by this is, that such facts are competent as a basis of damages for detention. The difficulty is in making the requisite proof, both as to the fact of actual loss and of the amount. But more of that hereafter.

That the Supreme Court so understood the rule, and that no *ultimatum* was laid down in the case of *Williamson v. Barrett* (13 How. 101), I think appears with reasonable certainty by the opinion of that Court in *Sturgis v. Clough* (1 Wall. 269), by Justice Grier, in 1863. That was a case of collision. The injured vessel was detained fourteen days while undergoing repairs. The commissioner allowed demurrage on the naked opinions of witnesses as to what the vessel might have earned per day if engaged, unsupported by the exhibit of the owner's books, to show what she had actually made previously or afterwards. The District Court disallowed the demurrage, and the Supreme Court sustained the decision. The District Court did, however, allow something in consideration of demurrage, by way of confirming the commissioner's report as to the amount allowed for repairs, which the Court regarded as too much, saying, "the result would be about just between the parties on the whole case." It appears that the injured vessel was a tug-boat used by her owners in towing vessels to and from sea, about the harbor of New York. In deciding the case, the Supreme Court (p. 272) say: "The Court did not decide that demurrage was not a proper item to be allowed in the computation of damages, but that the amount of his decree was a just allowance for all damages sustained by libellant." The force of this language will be understood by reference to the facts of the case in regard to

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which it was used, as above stated. And again: "On reviewing the evidence, we are satisfied that the sum allowed in the decree was 'just between the parties.' The report of the commissioner, allowing the whole bill for repairs, was not just, because the repairs necessarily made were chargeable not wholly to the collision, but to the age and previous condition of the boat. The charge for demurrage allowed by him was not justified by the evidence, although there was testimony to support it such as can always be obtained when friendly experts are called to give opinions." Thus recognizing that even such testimony as the opinions of experts as to the probable daily earnings of the vessel, in her common employment by her owner, is competent testimony, although not sufficient alone to justify the allowance. The Court then, in the same connection, proceeds: "Besides, the libellant withheld the best evidence of the profits made by his boat, which would be found in his own books, showing his receipts and expenditures before the collision." Now, while this can hardly be given the force of a direct ruling upon the question, yet it is not mere *dictum*; and I think it is not claiming too much for it to say that it is a clear recognition of the doctrine that the probable net earnings of a vessel during detention, under circumstances very much like those of the present case, constitute a proper basis of damages for demurrage, and that the books of the owner showing the receipts and expenditures of the vessel before the collision are not only competent testimony, but constitute the best evidence as to the amount of such probable net earnings.

In the present case, the commissioner had before him not only the opinions of several competent experts as to the value of the services of the Dove to her owner per day, but the owner's books, from which trip sheets were made out and attached to the report, showing her daily receipts and expenditures during the month immediately preceding the collision, and the month immediately following the resumption of her trips.

Besides the inference above drawn from *Sturgis v. Clough*

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(1 Wall. 269), that the Supreme Court regards probable future earnings allowable as damage for detention in cases of marine tort, like the present, we have the positive opinion of Judge Leavitt, late of the Southern District of Ohio, in his charge to the jury in *Jolly v. Terre Haute Draw-bridge Company* (6 McLean, 238), and Judge Benedict, of the Eastern District of New York, in *The Cayuga* (2 Ben. 125), and of Woodruff, Circuit Judge, in the same case (7 Blatch. 385), that such earnings do constitute a proper basis of damages in such cases. See also opinion by Justice Nelson, in the *R. L. Mabey* (4 Blatch. 439). Such is clearly the rule in England, as has already been shown. See also Lowndes on Collisions at Sea, 154 to 156, and Shearman and Redfield on Negligence, section 599.

The subject of future profits, as a basis of damages in cases of tort, has undergone a vast amount of judicial discussion and decision in the law courts. A broad, if not well defined, distinction between actions *ex contractu* and actions *ex delicto*, is recognized in this regard, wherever it has been drawn in question. In actions *ex delicto* it is the almost, if not quite the unanimous voice of those Courts, that such profits are recoverable as damages. Not speculative and merely possible profits. Those are never allowed. In order to be recoverable, "its source must be ascertained and its extent defined, and its realization must appear to have been reasonably certain." And I am willing to go further, and say its source must be the direct and immediate use or service of the thing injured, or the prosecution of the business interrupted.

The numerous cases cited by counsel from the law courts have been examined by me, so far as within my reach. It would be extending this opinion to too great length to notice them in detail. I shall, therefore, content myself with a simple citation of some of the leading and more prominent cases: *Lacour v. The Mayor, etc.* (3 Duer, 406); *St. John v. The Mayor, etc.* (6 Duer, 315); *Walter v. Post* (Ib. 363); *Allison*

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v. *Chandler* (11 Mich. 542); *Sewall's Falls Bridge v. Fisk* (23 N. H. [3 Fost.] 171); *Griffin v. Colver* (16 N. Y. 489).

The question in this class of cases is, has the owner lost anything by the delay, and, if so, how much? The answer to this question determines the right of the owner to recover damages for the detention. And in a case like the present, where the vessel was not kept for hire, but was kept for the owner's own use, and where there was, in fact, no market rental value of vessels, and no demand for employment in that way, the answer to be given depends upon the answer to certain other questions: First, had the owner use or employment for his vessel during the detention? And, second, how much would she have earned in such use or employment? Under the evidence in the present case, the answer to the first question is not difficult. The *Dove* constituted one of a line of steamers on a certain route, and upon which she was actually employed at the time of the collision. The libellant corporation continued to occupy that route during the entire time of the detention, and the *Dove* resumed her place upon it after the detention. At the time of the collision, and, in fact, during the detention, the libellant had virtually a monopoly of the route for both freight and passengers, and the earnings of the *Dove* upon the route were profitable. Of that use and employment, and of these earnings the libellant corporation was deprived by the collision. As to these conclusions from the evidence there is no contest or dispute. Clearly, then, libellant is entitled to recover something on account of the detention. How much depends upon the answer to be given to the second question. How much would the *Dove* have earned in such use and employment, but for the detention? The solution of this question presents some difficulty; it borders so closely upon the boundary line between that which is certain and that which is uncertain, shadowy, contingent and speculative. That the *Dove* would have earned something over and above her expenses we have already seen. The difficulty exists in determining how much. The certainty required is not absolute certainty, but reasonable certainty. In the first place, we have

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the opinions of several respectable boat and vessel owners, placing the value of the use of the Dove to her owner at sums varying from \$110 to \$130 per day. The opinions of witnesses, as we have seen in *Sturgis v. Clough* (*supra*), although competent testimony, are not sufficient alone to determine the amount.

But in the present case, the books of libellant were exhibited, showing the gross daily earnings of the Dove for the month of May immediately preceding, and for the month of July following the detention—testimony clearly recognized by the Supreme Court in *Sturgis v. Clough* (*supra*), as not only competent, but as the best evidence of the probable earnings of the vessel during the detention. And it is clearly the best evidence of which the case admits. In addition to this, the testimony shows that the month of June, during nearly the whole of which the Dove was detained, was the best month of the season. There is no conflicting testimony. It seems to me the testimony is sufficient from which the value of the use and services of the Dove, and the consequent damage to her owner by her detention, may be ascertained with reasonable certainty. I am free to admit, however, that the question is not free from difficulty, and some doubt. But the evidence given being the best the case affords, and being reasonably certain, I think strict justice requires that the party in fault should bear whatever inconvenience or hardship there may be arising out of the attendant difficulties and doubts. Dr. Lushington, in the case of *The Gazelle*, *supra* (2 W. Rob. 281, 284), in remarking upon the general question, with great clearness and justice, said: "The right against a wrong doer is for a *restitutio in integrum*, and this restitution he is bound to make without calling upon the party injured to assist him in any way whatsoever. If the settlement of the indemnification be attended with any difficulty (and in those cases difficulties must and will frequently occur), the party in fault must bear the inconvenience. He has no right to fix this inconvenience upon the injured party; and if that party derives incidentally a greater benefit than mere indemnification, it arises only from

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the impossibility of otherwise effecting such indemnification without exposing him to some loss or burden, which the law will not place upon him." It is true, this was said against a reduction of one-third new for old, as in insurance cases, in determining the amount due for repairs; but at page 284 the learned doctor expressly applies the same doctrine to demurrage.

The collision occurred on the night of the 31st day of May, and the Dove resumed her trips on the 28th day of June, 1869. The first nineteen days of May her trips were not daily, nor, in all cases, regular. She, in fact, made only five trips during that period. I think, therefore, that those trips must be excluded in arriving at her average daily earnings.

During the last twelve days of May and the whole of July she made regular daily trips, except Sundays and the Fourth of July. She may have been, and probably was, employed on excursions on those days, but as nothing appears in the evidence with sufficient certainty to base any calculations upon as to these days, they must be treated as lay days, and excluded from the estimates. Excluding these lay days, then the Dove made eleven regular daily trips in May, and twenty-seven in July. Her gross earnings for the eleven days in May were \$2,137 83, and her gross expenses for the period of time covered by these eleven days were \$982 85, calculated on the basis of her gross expenses for the whole month, as proven. Her net earnings, therefore, for the eleven days in May were \$1,154 98, and her average net earnings per day were \$105. Her gross earnings for the twenty-seven days in July were \$6,167 70, and her gross expenses for the whole month \$3,179 88. Her net earnings, therefore, for the twenty-seven days in July were \$2,987 82, and her average net earnings per day were \$110 66. Looking at these results, and taking into consideration the opinions of the expert witnesses estimating the value of the use and services of the Dove to her owners at \$110 to \$130 per day, and the evidence that the period of her detention comprised a large portion of the most profitable part of the season, it clearly appears that the amount, \$100 per day,

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fixed by the commissioner, is certainly not beyond, but, on the contrary, is entirely within the amount of the boat's probable net daily earnings during the time of her detention. I shall, therefore, not disturb his report in that respect.

But the able and usually accurate commissioner who made the report has committed two errors in regard to the number of days for which allowance for demurrage shall be made. In the first place, he has allowed for twenty-eight days when only twenty-seven intervened between the time of the collision and the resumption of her trips by the Dove. The collision having occurred on the night of May 31st, and the Dove having resumed on the 28th day of the following month. In the second place, no allowance was made for lay days. I think this allowance should be made, for the reason that the same proof upon which we base our conclusions as to the value of the boat's earnings, shows quite as clearly that Sundays were usually though not quite always, lay days. As four of these occurred during the twenty-seven days' detention, they must be deducted from the time. This is necessary to make the estimates as to time, and as to the amount of damages per day, consistent with the basis upon which both are established. And it is contrary to justice that the owner should receive pay for such days as it is reasonably certain, for anything the proofs show, the boat would have earned him nothing. Deducting the four days from the twenty-seven days, leaves twenty-three days, for which the allowance must be made at \$100 per day, making in all \$2,300, instead of \$2,800, as found by the commissioner; and his report must be modified accordingly. The difference \$500, together with interest thereon, at the same rate, and for the same time allowed by the commissioner on the whole amount, must be deducted from the gross amount of the commissioner's report.

2. As to the allowance made for the services of the steamer Eighth Ohio. Both parties except as to this item; respondent claiming it is too high, and libellant claiming it is too low. There is no dispute as to the fact of the service being rendered, its necessity, and as to the length of time.

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The only dispute is as to the amount. The steamer belonged to libellant. She was hired by the underwriters, and was used by them as a wrecking vessel in raising the Dove. She was so used in running of errands, boarding and lodging the men, and tugging. The price agreed to be paid was \$140 per day, and that amount was paid, and allowed in the adjustment. Libellant claims that the price was agreed on and paid in good faith, and that the whole amount ought to be allowed. Respondent claims that a lower priced boat might have been obtained which would have answered just as well, by reasonable diligence; that the amount was unreasonable, because there was no crew hired with her, or if hired, it was unnecessary, as the crew of the Dove could have been used on her; and that at all events the crew of the Dove was in fact so used to some extent. The commissioner reduced the amount from \$140 per day, as claimed, to \$100 per day, and fixed the allowance on that basis. The testimony appears to be somewhat conflicting, and, as it comes to me, the preponderance is not palpable. The commissioner had the witnesses all before him, and heard their testimony, and no doubt gave it careful consideration. Under these circumstances, the safer rule appears to be, not to disturb the finding of the commissioner, and such I believe to be the usual practice (see *Egbert v. Baltimore & Ohio Railroad Company*, 2 Ben. 223; *Holmes v. Dodge*, 1 Abb. Adm. 60). The exceptions to this item are therefore overruled.

3. As to the remaining exceptions. * * * Libellant's second exception is to the disallowance of the sum of \$100, paid Joseph Nicholson. However valuable Nicholson's aid may have been to libellant in the settlement and payment of bills—and I have no doubt it was valuable—I fail to see its necessity, and I think it is too remote to be charged as a necessary consequence of the collision. I therefore consider the disallowance correct. * * * Respondent's eighth exception is to damage to cornice, head lines and frescoes, \$300. This allowance was made solely upon the estimate of Captain Sloan, master of the Dove, and who had charge of the repairs

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generally. Estimates of this kind are allowed and acted on in cases where the repairs have not been made at the time of the assessment, but never, I believe, where the repairs have been actually made. Where the repairs have been made, I believe it to be the invariable rule—at all events, I am clear that it ought to be—to adopt the actual cost of the repairs as the measure of damages. The actual cost admits of certainty of proof, while estimates depend upon the mere opinions of witnesses which may or may not be correct. In this case, the cabin, in which this item of damage is alleged to have been done was repaired, and it does not appear what these particular repairs cost, separately from the general repairs. Under the rule above stated, there is therefore no basis on which to make the allowance.

The remaining exceptions involve merely questions of fact and are not reported.

*aff'd C.C.
note @ end*

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JULY, 1871.

*aff'd S.C.
The Colorado 91 W. 1872*

COLLISION IN A FOG.—SPEED.—LOOKOUT.—SUFFICIENCY OF WATCH.
—INEVITABLE ACCIDENT.

A propeller of 1,400 tons burden, navigating Lake Huron in the usual track of vessels, in a dense fog, should have at least two men at the wheel, and two competent lookouts, experienced in the navigation of those waters.

A steamer should adopt such a rate of speed in a fog as will place her headway under such easy and ready command that she can be stopped within such distance as other vessels can be seen from her, on the assumption that such vessels will do their duty in apprising her of their proximity.

The chief officer of a steamer running in a fog should be so placed that he can have instant access to and command of the signals to the engineer.

An erroneous order, given in the midst of confusion and consternation incident to sudden peril, is not a fault.

A crew cannot be held in fault for abandoning a vessel when her injury is of such a character as to afford reasonable apprehension that all efforts to save her will be unavailing and perilous.

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LIBEL for collision by Elon W. Hudson, owner of the bark H. P. Bridge.

The collision occurred between eleven and twelve o'clock at night, on the eleventh day of May, 1869, on the westerly side of Lake Huron, opposite Saginaw Bay, and about midway between Point aux Barques and Thunder Bay lights.

The bark was bound down, on a voyage from Milwaukee to Buffalo, with a cargo of about 30,000 bushels of oats and 65,000 brick, and the propeller was bound up, on a voyage from Buffalo to Chicago, with about one-third of a cargo of general merchandise.

The wind was about south, and for some time before the collision the bark had been sailing by the wind on the starboard tack, close-hauled, her course being about southeast by east while on that tack. She kept that course till a moment before the collision, when her wheel was put hard a-starboard. The course of the propeller was about north northwest, which course she kept until a very short time before the collision, when her wheel was ordered hard a-port. Before that order had been fully obeyed, however, it was countermanded, and the wheel was ordered hard a-starboard, which latter order was fully obeyed, and the collision occurred almost immediately after.

The propeller struck the bark near the main-mast, on the starboard side, at an angle variously estimated by the witnesses from forty degrees from the bark's stem to a right angle. The truth was somewhere between these extremes, and probably nearer forty-five degrees.

At the time of the collision there was a fog, which was then and for about an hour before had been so thick that it was difficult to distinguish a vessel's lights at any considerable distance. From the time the fog set in, and up to the collision, the bark had blown her fog-horn, and the propeller had blown her steam whistle, regularly, as required by law; and just as those in charge of the bark saw the propeller coming down upon her, the bark's fog-bell was rung.

By a custom adopted and used by sailing vessels on the

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lakes, and well understood by experienced mariners, and competent to navigate those waters, a single blast of the fog-horn, at proper intervals, signifies a vessel on the port tack, close-hauled, and a double blast, at like intervals, a vessel on the starboard tack, close-hauled. By these signals and the direction of the wind, with the exercise of reasonable diligence, the location and course of approaching vessels can always be determined with reasonable certainty before the vessel or her lights can be seen. In this case, the bark being on the starboard tack, close-hauled, sounded her fog-horn in double blasts, pursuant to the custom.

The bark had taken in her light sails and her fore-sail, and at the time of the collision was proceeding at a slow speed. The propeller's speed had also been slackened when the fog set in down to three to five miles an hour, as variously estimated by the witnesses on the part of the propeller.

The proof showed that the bark's fog-horn could be heard against the wind at least a half a mile. The propeller's whistle was heard on the bark for several minutes—nearly an hour, according to the testimony of the master of the bark—before the collision. The bark's horn was not heard on the propeller, or, if heard, was not distinguished from other horns in the vicinity; or, if heard and distinguished, was not reported or noticed on the propeller, until a very short time—not more than one minute and a half, by the highest estimates, and probably not to exceed one minute—before the collision.

When the bark's horn was first heard on the propeller, it was apparently dead ahead and very close by. When first heard it was understood on the propeller as a single blast, indicating, as we have seen, a sailing vessel on the port tack, close-hauled. It was then that the order hard a-port was given on the propeller, which was correct if the horn had been correctly understood, but wrong according to the true state of the case. Before this port order had been fully obeyed, however, the horn was again heard on the propeller, and correctly understood. It was then that the order to port was countermanded, and the order hard a-starboard was given and executed.

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When the bark's horn was first recognized on the propeller, the officer in charge of her navigation was standing in front of the pilot house, and where he had no means of signaling the engineer. As he gave the order to port, he started and ran upon the pilot house, the nearest place where he could signal the engineer, and at once signaled that officer to stop the engines, which was done as soon as the order could be obeyed. So the engines were stopped between the times the order to port and the order to starboard were given. Immediately upon giving the order to starboard, the signal was given to back the port engine, but just at this moment the green light of the bark being seen from the propeller, right under her bows, or not to exceed fifty to seventy-five feet off, the signal was given to back both engines, both of which signals were obeyed. The time between the signals to back with both engines and the collision is variously estimated by the witnesses, some putting it immediately and some as long as one minute. But taking into consideration all the circumstances, especially the close proximity of the vessels when the order was given, and the headway the propeller evidently still had when the collision occurred (judging from the severity of the blow), it must have been almost immediately, or but a very few seconds at most.

The officers and crew of the bark got on board the propeller at once, and the latter stood by the bark for about an hour, during which time she remained afloat. The bark then drifted away from the propeller and passed out of sight, either in the fog or by sinking, it being uncertain which, and has never been seen since.

As to the extent of the injury there was considerable conflict. Those on board the bark estimated the extent of the cut into her side at from eight to ten feet. But in the alarm of the moment, and in their hurry to leave what they considered a sinking ship, it was argued they would be quite likely to make an overestimate. It was insisted it was not probable that the bark would have remained afloat as long as she did with so extensive a breach in her side, notwithstanding the buoyancy of a portion of her cargo. The Court held it abund-

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antly proven that the injury was considerable, and sufficient to cause the bark to sink. At all events, the bark and her entire cargo were lost; and that such loss was directly attributable to the collision was not seriously questioned.

The damages claimed are \$33,625.

The libel charged the propeller with the following specific faults:

1. Not properly manned.
2. Officers and crew not at their proper places and attentive to their duty.
3. No competent lookout.
4. Too great speed.
5. That she did not take timely and efficient precautions to avoid the bark.

The only denials and allegations of the answer, by way of defense, were the following:

“The said respondents allege that the said collision happened without any fault or negligence, or want of care or want of skill on the part of the said propeller, or any of her officers or crew; and they allege that the same was caused (if any fault existed on the part of either vessel) from the fact that, as appears from the said libel, the fog signal of the propeller being heard on the said bark, and both vessels being in a fog, the said bark might have avoided and kept out of the way of the said propeller, which she did not do; or from the fact that the said bark had no proper lookout, or did not have a proper fog signal, or did not properly use and sound the same; or from the fact that the said bark was (as in fact she was), at and before the time of said collision, unseaworthy, overloaded and unmanageable.

“The said respondents allege, however, that they are ignorant of and as to what was done on board the bark, but expressly charge, as aforesaid, that if any fault existed on the part of either vessel, such fault was upon the part of the bark, her officers and crew.”

After detailing the circumstances of the propeller standing by the bark, and the latter remaining afloat so long as she did,

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and alleging offers of assistance on the part of the propeller, the answer concluded as follows:

“ That the said officers and crew of the said bark neglected and refused to return to said bark, and neglected and refused to take any steps to save the said bark and her cargo from loss, and that by reason of such abandonment of the said bark by her officers and crew, and their aforesaid refusal and neglect, and by reason of the said bark being, as aforesaid, unseaworthy, overloaded and unmanageable, and by reason of fault heretofore charged on the part of said bark, and not by reason of any fault, negligence, or any other matter in the said libel alleged upon the part of said propeller, her officers and crew, said bark and her cargo were lost, as the said respondents are informed and believe.”

Most of the matters set up in the answer were insisted on at the hearing as defenses, but the defense which was mainly contended for, and the most strenuously urged, was one not specifically claimed in the answer, viz., that the collision was the result of inevitable accident.

Messrs. *H. B. Brown* and *J. S. Newberry*, for libellant.

Mr. *W. A. Moore*, for claimant.

So far as the propeller is concerned this was an inevitable accident (1 Pars. on Ship. 525; *The Virgil*, 2 W. Rob. 201, 205; *Union Steamship Co. v. N. Y. & Va. Steamship Co.* 24 How. 307, 313, 319; *Stainbach v. Rae*, 14 How. 532, 536, 538; *Peck v. Sanderson*, 17 How. 178, 182; *The Morning Light*, 2 Wall. 550, 554, 560; *The Grace Girdler*, 7 Wall. 196, 203.

Mr. *Geo. B. Hibbard*, on the same side.

The watch on the propeller's deck was complete.

(1) In cases where inevitable accident is claimed as a defense, as in all others, the burden of proof is on the libellant to show a fault (*The Bolina*, 3 Notes of Cases, 208, 210; *The Marpesia*, L. R. 4 P. C. 212).

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(2) A fault cannot be established unless it be made to appear the propeller violated some *law, regulation, rule, or custom*. This the libellant has not shown.

(3) It is not within the province of Courts to establish rules or standards by which liability can be determined. The Steamboat Act of 1852 (10 Stat. at Large, 72) gave the inspectors power to pass rules and regulations. They might have adopted a rule with reference to the sufficiency of a watch in a fog, as they actually have done with respect to steam whistles (1 Pars. on Ship. 590). They regarded "great caution" necessary only in crowded channels or the vicinity of wharves. To permit the Court to make the rule would be to determine there was no rule, as judges would differ in opinion as to the sufficiency of a watch.

(4) No adjudged case requires a greater watch than the propeller had, or that the watch should be doubled in a fog.

(5) When the horn was heard, it was reported to and understood by the first officer, and then the function of the lookout ceased, and he was at liberty to do as he did—aid the wheelman (*The Maria Martin*, 12 Wall. 31).

The bark changed her course before the collision.

The round assertion of the crew that the course was not changed will not be allowed to prevail against conceded facts, which indicate that such change must have been made (*The Wenona*, 8 Blatch. 499, 509, 512).

Mr. *H. B. Brown*, in reply.

With regard to the sufficiency of the watch, the fact that the propeller violated no express law, rule, regulation, or custom is not the proper criterion. The question is not what these require, but what does good seamanship require under Article 20. The practice of carrying any lookout at all upon the lakes was not in obedience to any law or custom to that effect, but solely in consequence of the decision of Admiralty Courts that good seamanship required one. Before the Act of 1864 none was required by statute, and shipmasters fought

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against it till the Courts compelled them to carry one. The Court must determine what a proper lookout is, and in the case of *The Europa* (2 E. L. & Eq. 557), five seamen were adjudged insufficient.

LONGYEAR, J. I shall consider first the fifth specification of fault against the propeller, viz.: That of her failure to keep out of the way of the bark.

The solution of the question of fault here presented depends upon Article 15 of the Act of April 29th, 1864 (13 Stat. at Large, 60), as applied to the facts of this case:

"Article 15. If two ships, one of which is a sailing ship and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing ship."

Article 15 is general in its application. The duty it imposes attaches all the same, whether it be in the day time or in the night, in clear weather or in a fog. Its requirements are in no manner affected or modified by the provisions of Article 16. Those provisions merely impose additional preliminary duties. Hence, the fact of a collision between a steamship and a sailing ship must be held *prima facie* evidence of fault on the part of the former, in a fog as well as in clear weather.

The steamship must, of course, be apprised of the existence of the conditions upon which her duty under Article 15 attaches, and she must be so apprised as to be enabled to act intelligently and effectually. These conditions are:

1. The fact that there is another ship in her vicinity.
2. That such other ship is a sailing ship; and,
3. The position and course of the latter.

In the day time this is accomplished by actual observation of the vessel. In the night, it is by means of the lights every sailing vessel is required by law to carry. In a fog, whether by day or by night, it is by means of a fog-horn blown at short intervals, if under way; or the ringing of a bell, if not under way (Article 10, Act of 1864, above cited). The differ-

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ence is in the mode or means merely, and not in the result. In the one case, it is by the sense of sight, and in the other by that of hearing. In the eye of the law, the result in both cases is precisely the same; and the legal obligation of a steamship to see in the one case, and to hear in the other, and to govern herself accordingly, attaches precisely the same in the one case as in the other.

Therefore, unless it appears that the bark did not do her full duty, and that such failure on her part contributed to the collision, there is no occasion to inquire into the details of the conduct and manœuvres of the propeller because, in such case, the fault of the latter consists in the fact that she did not keep out of the way of the former. The first inquiry, therefore, is as to the conduct of the bark.

There is no dispute but that the bark kept her course, as she is required to do by Article 18 of the Act of 1864, up to the time she put her helm hard a-starboard. This was done in the midst of the confusion and consternation incident to the sudden peril in which the bark was placed by the propeller, the latter then being almost upon her. Even if the starboard order was an error, it was therefore not a fault to which any responsibility can be attached.

That the bark's lights were properly set and brightly burning, that she was properly manned and equipped, that her officers and crew were properly placed and attentive to duty, and that her fog-horn was properly sounded, are fully made out by the proofs, and are in fact undisputed.

It is said, however, that the bark being apprised, as she was, of the approach of the propeller by hearing the signal blasts of her steam whistle a considerable time before the collision, she ought to have got out of the way of the propeller, and also ought to have rung her fog-bell sooner than she did, in order the more effectually to have notified the propeller of her presence and position.

By Article 18 the bark was required to keep her course. By Article 10 she was required to use her fog-bell only when not under way. Here she was under way. The claim, there-

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fore, is that the bark should have departed from those rules, both as to course and as to signals, and consequently that the case comes under Article 19, which provides as follows:

“In obeying and construing these rules, due regard must be had to all dangers of navigation, and due regard must be had to any special circumstances which may exist in any particular case rendering a departure from the above rules necessary in order to avoid immediate danger.”

The danger of navigation which was then present—the fog—was one that was expressly provided for by Articles 10 and 16, and with reference to which, as well as Article 18, the bark was acting. This she had a perfect right to do, unless some of those special circumstances mentioned in Article 19 should have arisen and come to her notice, requiring a departure from the rules. The special circumstances in this case, to which the collision is directly attributable, are the failure of the propeller to hear, and when she did hear, at first to rightly understand the bark's signal, and her failure to stop her headway in time to avoid a collision after she did correctly understand those signals. There is not, and cannot be, any pretense that the bark had any notice or intimation whatever that the leviathan which was in her vicinity was not provided with ears to hear her warning signals, or having ears, would fail to put them to their proper use, or would approach so near before taking any measures to avoid her, that when taken they would be ineffectual. Neither is there any ground to claim that she could have known the propeller was coming down upon her sooner than she did know it. And when she was made aware of it, it was clearly too late for any effective action on her part. She did what, in the alarm incident to the suddenness of the peril thus brought upon her, and without her fault, was thought best, but to no avail. For her to have changed her course before this would have been in violation of Article 18; and for her to have rung her bell sooner than she did would have been in violation of Article 10, either of which would have constituted a fault for which she might have been held responsible if a collision had still occurred. It is true, after the danger had become immi-

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ment, and in fact the collision was inevitable, her wheel was put to starboard, and her bell was rung, but, as we have already seen, these acts, even if erroneous, cannot be attributed as faults under the circumstances.

It is also claimed that the injury was but slight, and that the bark was unnecessarily abandoned by her officers and crew. The proofs clearly show that the injury was of a serious character and sufficient to sink the vessel, and that the loss of the vessel and cargo were directly attributable to that cause. It is true she remained afloat for an hour at least, but she was a long distance from shore and on very deep water, and her injury was of such a character as to afford reasonable apprehension, to say the least, that all efforts to save her would be unavailing, and could only result in peril to those who should undertake it. It would be unreasonable to require the crew of a vessel to remain upon her under such circumstances.

The bark, then, being in no manner in fault, the only defense that remains to be considered is that raised upon the argument, viz.: That the collision was the result of inevitable accident; and this, as we shall see, involves a consideration of the particular conduct and manoeuvres on the part of the propeller, including the question of speed.

"Inevitable accident" is defined by Dr. Lushington to be "that which the party charged with the offense could not possibly prevent by the exercise of ordinary care, caution and maritime skill" (*The Virgil*, 2 W. Rob. 201). Our own Supreme Court defines it to be "where a vessel is pursuing a lawful avocation in a lawful manner, using proper precautions against danger, and an accident occurs." "The highest degree of caution," say the Court, "that can be used is not required. It is enough that it is reasonable under the circumstances" (*The Grace Girdler*, 7 Wall. 203; see, also, *The Pennsylvania*, 24 How. 307, 313; *The Washington*, 14 How. 532, 536; *The Morning Light*, 2 Wall. 550, 554, 560).

It becomes necessary, therefore, next to inquire whether reasonable care, caution and maritime skill were exercised on the part of the propeller under the circumstances.

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The propeller was a large vessel, being of upwards of 1,400 tons burden. She was in waters frequented by other vessels, and was in fact in the vicinity of other vessels at the time, as indicated by the fog-horns heard on board of her. She was so proceeding in a fog, in which other vessels could be seen but a short distance, on which account emergencies were likely to arise, in which a sudden change of course would become necessary to avoid accidents, which, as the proof shows, would require two men at the wheel to accomplish with reasonable celerity. She was so proceeding, too, with fog-horns sounding from vessels on nearly all sides of her; requiring close scrutiny to distinguish any one of them from the others.

With a full knowledge of all these facts on the part of those in charge of her navigation, we find the propeller proceeding at a rate of speed which I think the proof clearly shows to have been not much, if any, less than five miles an hour, and with a watch of only four persons, consisting of the mate in charge, one man at the wheel, one man on the lookout forward, and one engineer—a watch barely sufficient on such a vessel on the clearest night—and, we may add, the master, although notified of the peril, calmly reposing in his stateroom.

And then, when the crisis comes, and seconds assume the magnitude of minutes in estimating the time within which the headway of the propeller must be stopped in order to avoid the catastrophe, we find the officer in charge of the deck out of reach of the means provided for signaling the engineer to stop and reverse.

Let it be borne in mind that the care and caution used must be *reasonable under the circumstances*. The watch on the propeller may have been a reasonable one (it certainly could have been no less and be a reasonable one), and the position of the mate in front instead of on top of the pilot house may have been a reasonable position on a clear night.

But it certainly needs no argument to show that what is barely sufficient on a clear night would fall far short of being such in a fog, with the attendant circumstances above stated. Upon a vessel of that size reasonable care and caution, under

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the circumstances, required two men at the wheel to insure celerity in that regard, and two competent lookouts, experienced in the navigation of those waters, to insure close scrutiny of the many signals from vessels in the vicinity, and that the officer in charge should have been where he could have instant access to, and command of, the signals to the engineer. I think this much, at least, was absolutely necessary to answer the law requiring reasonable care and caution under the circumstances.

It cannot be said that those omissions did not contribute to the collision. I think it quite clear from the proofs that they did.

1. According to the proofs, the propeller came within the sound of the bark's fog-horn when at least half a mile distant. Why was it not heard, or, if heard, why was it not distinguished from the other horns until the two vessels had arrived in such a fatal proximity that a collision was inevitable? It certainly cannot be attributed to the fog, because sound will travel as well in a fog as in a clear atmosphere, and, as is well known, is often intensified by it. It was unquestionably owing to the insufficiency of the lookout, both in number and in the competency of the one on duty. An additional lookout would at least have afforded another chance of escape. And when we take into consideration the fact, as shown by the proofs, that the lookout who was then on duty was on his first trip on the lakes, and that, although an old sailor on the ocean, he was confessedly unacquainted with the use of fog-horns, the necessity of an additional lookout assumes a vastly greater importance.

2. The want of a second man at the wheel made it necessary to call the lookout from his post before the necessity of a lookout forward had ceased to exist, as the exact position of the bark had not then been made out.

3. The propeller kept her headway just as much longer than she would have done if the mate had been at his post on top of the pilot-house, as it took him to get there from where he was, which was several seconds. While the accident might

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not have been entirely avoided if this time had been saved, it certainly would have made the blow less severe.

4. I think, also, that reasonable care and caution were not exercised on the part of the propeller in regard to her speed.

The words "moderate speed" are used in Article 16 in a specific and not in a general sense. It is moderate speed in a fog that is meant. Therefore, within the meaning of the article, what would be moderate speed in a clear day or night is not necessarily such in a fog, and what would be moderate speed in a light fog, one in which objects can be seen at a considerable distance, would not be such in a denser fog in which objects can be seen at a less distance. "Moderate speed," therefore, as used in Article 16, is a relative term, and whether or not it be such, must be determined, not by any certain fixed number of miles per hour, but by the particular circumstances of each case in which the question arises.

By what criterion, then, shall the rate of speed be judged? The object and purpose of the rule requiring moderate speed in a fog is to avoid collisions. That object can be accomplished only by each steam vessel adopting such a rate of speed in a fog as will place her headway under such easy and ready command that she can be stopped within such distance as other vessels can be seen from her; on the assumption, however, in all cases, that such other vessels will do their full duty in apprising approaching vessels of their proximity. If the speed of a steam vessel in any given case is greater than this, it is too great, and, in case of collision, she must be held in fault, no matter what her rate of speed per hour actually is. It is believed that there is no other safe criterion by which the object of the rule can be insured.

This criterion substantially has been recently adopted and applied by both the Circuit and District judges in the Southern District of New York, in three cases of considerable importance, and to which, to say the least, it applies with no greater force than to the present case (see *The Western Metropolis*, 7 Blatchf. 214; *The D. S. Gregory*, 2 Ben. 166; *The*

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Louisiana, Ibid. 371. See, also, *McCready v. Goldsmith*, 18 How. 90, 91).

The practical application of the rule above indicated certainly cannot be difficult in actual practice. A fog is never of sudden occurrence, or, at least, never so sudden as not to afford ample time for deliberation in regulating speed. The pilot of every steam vessel ought to know, and every competent pilot, of course, does know practically within what distance his vessel can be stopped at any given rate of speed. He can also judge with practical certainty about how far off in any case in hand he can see another vessel in a fog. Here, then, he has all the data by which to regulate his speed with practical certainty, so as to insure safety to his own and to other vessels.

Now, to apply the rule to the present case:

The mate testifies that upon the first intimation he had of the proximity of the bark—this, it must be remembered, was by hearing her fog-horn, and before she had yet been seen from the propeller—he instantly, or as soon as he could get to where he could do so, signaled the engineer to stop. That on hearing the two horns, which was almost immediately after, he signaled the port engine to back. That immediately after this, and for the first time, the bark's green light was seen from the propeller, when he immediately signaled both engines to back. The engineer testifies that all these orders were promptly obeyed, and that both engines continued to back, and to back strong up to the time the propeller struck the bark. Notwithstanding all this exertion, the speed of the propeller was still such, when she reached the bark, as to crush in her side, inflicting a serious and fatal injury, which shows that her speed must then have still been very considerable.

Under the rule above stated, therefore, the speed of the propeller was not that moderate speed meant by Article 16, as applied to the circumstances of this case.

It will not avail the respondents anything to attempt to excuse the failure of the propeller to stop in time to avoid a collision by saying that those in charge of her did not learn of the bark's proximity and position in time to do so, because, as we have already seen, that excuse itself constitutes a fault.

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The propeller, therefore, being in fault in the particulars above specified, the defense of inevitable accident is not admissible.

It is true that fogs constitute one of the great, perhaps one of the greatest, perils of navigation, especially upon those waters constituting, as in this case, great highways of commerce, and courts should no doubt deal leniently with vessels charged with fault in cases of collision where this great peril is a contributing cause, but not so leniently as to encourage a letting down from that reasonable degree of care, caution and diligence due in such circumstances to the safety of life and property, and the general interests of commerce.

In view of the importance which the case assumes, as well in regard to the greatness of the calamity to the libellant in the loss of his property, and the pecuniary loss to respondent if held liable, as to the general interests of navigation and commerce in having the rules as well defined as is practicable—an importance which was fully realized and ably met by the exhaustive and instructive arguments of counsel on both sides—I have given the case my closest attention and scrutiny, and endeavored to apply to it the rules of law in such a manner as not only to do simple justice between the parties, and no more, but at the same time to inflict no injury, but perhaps to be of some service to the interests of navigation and commerce generally.

So applying these rules, however, I am clearly of opinion that there was such a letting down on the part of the propeller from that due and reasonable care, caution and diligence above mentioned, as to constitute a gross fault on her part, and on account of which she is responsible for the damages done by the collision complained of.

Decree for libellant.

NOTE.—On appeal to the Circuit Court, the decree in this case was affirmed by Judge Emmons, in an oral opinion, substantially as follows:

Construing the opinion of the District Judge as it should be understood, not as adjudging that each criticism made upon the management of The Colorado, pointed out faults each *per se* sufficient to condemn her; but considering several of them as only just observations, pointing out irregularities in addition to

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the leading faults for which the libel was sustained, he could fully adopt its conclusions, and the grounds both of fact and law upon which they were based. Had there been lookouts sufficient in number and character, her speed such as that her progress might have been arrested within the distance at which a light might have been discovered, with a sufficient number of men at the wheel, and all officers diligently doing their duty, he could have agreed with the learned counsel for the respondents, that it would have been an "inevitable accident."

In such conditions, he would not have measured too closely the three or four seconds necessary for the officer in charge to make the bell signals, and condemn the ship owners for an error so slight as standing in front instead of upon the top of the pilot house. The latter, however, was in the opinion of experienced pilots, in the condition proved, his better place. He fully agreed with them, and mentioned this, with other minor matters of management he had referred to, only to suggest that this Court did not intend to set up severe and impracticable standards in advance of precedents, and in opposition to the opinions of able seamen. The satisfactory judgment rendered by the District Court in this cause clearly demonstrated this was necessary in order to sustain the libel. Owners whose liberality furnishes full crews instead of four men, upon such a steamer, in such a night, and officers whose duty was performed in that degree which long experience has shown to be compatible with general safety, will not meet upon the bench here theories which long service never would suggest, or breakers not laid down on the charts. To the rational general views, in this regard, of the respondent's counsel, and which he so well sustained, alike upon principle and authority, assent was most fully accorded.

It was said no better rule could be declared by which lawful speed in a fog could be measured, than that laid down by the District Judge. The recent cases referred to in his judgment, put into specific terms, applicable to the precise exigencies of this case, a general principle only, which numerous prior adjudications had fully established. That a steamer may run in a fog so thick as to preclude the discovery of an approaching light in time to avoid it, is a proposition which no interested owner of marine property, or any seaman not reckless of life, would ask a Court to assert.

With much emphasis, it was said that a lookout who did not understand the indications of the lights, horns and bells demanded by the regulations was incompetent. Various hypothetical cases were stated, illustrating the necessity of this knowledge. It was little less extravagant to say that any man with two eyes constituted a lookout, than that any other with two hands was a competent surgeon. It would be oftentimes a question of much difficulty, whether new conditions would make it the duty of a lookout to reannounce a light. Judge E., said, he had not very carefully considered whether, in the present case, the want of knowledge on the part of the lookout was a "contributory fault," and therefore, although being clearly of the opinion that he was incompetent, he nevertheless preferred to put his agreement with the District Court, in this part of the case, upon a ground by which he was willing hereafter to abide. That upon a steamer of this magnitude, and in such circumstances, *one* was not sufficient, nor was he prepared, without further inquiry, to lay it down as a rule,

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that two, even in a fog, were universally necessary. Ample manning in all other particulars might render one sufficient. No intimation was given which would in future preclude the inquiry when it arose.

Although the proof was not full in this case by experts that another wheelsman was needed, he deemed such evidence unnecessary. It was one of those conceded matters, of which, like the necessity of a *lookout*, a competent officer of the deck, and other evidently necessary seamen, the Court will take cognizance. In this very case the lookout was called from his post to assist the wheelsman, showing the necessity for his presence. In two other cases, now before the Court, the same fact appears. The testimony in all is full, that when a sudden movement may be necessary, two men at the wheel are necessary. The absence of the second man was a fault.

It is not entirely clear that the incompetence of the one lookout, the absence of a second, or the want of another wheelsman contributed to this disaster. The argument that all or some of them did so is highly persuasive. The law, however, presumes they did so until the contrary is proven. It cannot be said that such proof is made by the respondents in this case. He thought the learned counsel wholly mistaken in reference to the *onus probandi*, after it appeared that the ship was a steamer, bound to avoid the libellant's ship, and more especially when specific faults existed. Then the presumption was they did produce the calamity. This whole question, however, was deemed of less practical importance in view of the other leading fault—too great speed—which beyond doubt was the leading cause of the calamity.

Regret was expressed that the condition of business in the Court, and a temporary inability to labor save through the reading of others, precluded the preparation of a written judgment. The desire to do so, however, sprang more from a wish to consider some interesting points, learnedly discussed by counsel, and sufficiently germane to invite their consideration, than because the Court was not abundantly satisfied with the mode in which the cause was disposed of in the opinion already pronounced.

This case is now awaiting argument in the Supreme Court.

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THE COLORADO.

MAY, 1872.

DAMAGES.—MARKET VALUE.—EXPENSES OF EARNING FREIGHT.

In case of total loss by collision, the market value of the vessel just before the collision is the measure of damages.

The market value is not what she would have brought at forced sale, but in the ordinary course of the sales of such property.

From the gross freight should be deducted the probable future expenses of earning the same.

THE propeller Colorado was libeled by Elon W. Hudson, owner of the bark H. P. Bridge, for collision. The bark was sunk by the collision, and became a total loss, together with her entire cargo, which consisted of 65,000 bricks and 34,000 bushels of oats. The Colorado was held in fault, and it was referred to a commissioner to ascertain the damages. The commissioner having made his report, the respondents except to the same: 1, as to the amount allowed for the value of the bark; and, 2, because in the allowance for freight, no deduction was made for future expenses in earning the same, and that the amount allowed for freight was too large.

Mr. *Wm. A. Moore*, for the exceptions.

Mr. *H. B. Brown*, opposed.

LONGYEAR, J. *First*—As to the value of the vessel. The vessel being a total loss, her value just before the collision is the measure of damages. The difficulty is to ascertain the value. The criterion is, what she would have brought in the market, not under the hammer, at a forced sale, but in the ordinary course of sales of such property (Lowndes on Collisions, 141 to 146; 1 Pars. on Ship. and Adm. 542). The com-

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missioner estimated the value of the vessel on the opinion of the libellant and eight other persons, owners, dealers in and builders of vessels. No question is made as to the competency or ability of these witnesses to testify, except that some of them had not seen or been on board the Bridge recently before her loss; nor but that the commissioner's allowance of \$25,000 as the value of the bark is correct, as based upon those opinions. It is true that none of these witnesses, except the libellant and one or two others, had any knowledge of the condition of the bark just before the collision; but those who did know, particularly the libellant, described the condition in their testimony, and it is to be presumed that the commissioner applied the testimony of the other witnesses with reference to that description. To say the least of it, the testimony on the part of the libellant made a fair *prima facie* case for the allowance, and the question is now, was that case rebutted?

To rebut the case thus made by libellant, respondents produced the testimony of several vessel builders, showing the cost of building a vessel of the description of the one in question, and what is the estimated annual rate of depreciation in value, and upon that basis succeeded in reducing the value of the bark considerably below the amount allowed. In the case of *The Clyde* (Swab. 24), Dr. Lushington said, upon this subject: "The value is the market price at the time of the destruction of the property, and the difficulty is to ascertain what would be its market price. * * * In order to ascertain this (the value) there are various species of evidence that may be resorted to; for instance, the value of the vessel when built. But that is only one species of evidence, because that value may furnish a very inferior criterion whereby to ascertain the value at the moment of destruction. The length of time during which the vessel has been used, and the degree of deterioration suffered, will affect the original price at which the vessel was built. But there is another matter infinitely more important than this—known even to the most unlearned—the constant change which takes place in the market." And in

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another case (*The Iron Master*, Swab. 443), the same learned judge says: "The best evidence is the opinion of competent persons, who knew the ship shortly before she was lost. The second best evidence is, the opinion of persons conversant with shipping and the transfers thereof. In addition to testimony of this description, many other circumstances may be called in aid, as the original price of the vessel, the amount of repairs done her, the sum at which she was insured, and other circumstances of a similar nature. It is manifest that facts of this kind, though not to be wholly excluded, have a slighter bearing upon the case; for, after a lapse of years, the amount of price, from a change of circumstances, might have little bearing upon the question." And in *Dobree v. Schroder* (2 Mylne & Craig, 489), Lord Cottenham also held that the market price was a better test of a ship's value than the prime cost, with a deduction for wear and tear. The learned judge said: "The other mode has this disadvantage, that it can never be applied with certainty to any two cases. In one case, a ship may have been purchased advantageously, and employed disadvantageously; and in another the reverse may have taken place."

The correct rule upon this subject, when the vessel is a total loss, seems to be, that the market value of the vessel just before the collision is the proper measure of damages; that the best evidence of such value is the opinion of competent persons who knew the vessel shortly before she was lost; and that the next best evidence is the opinion of persons conversant with shipping and the transfer of vessels. There are, of course, exceptions to this rule, as when the vessel lost, from some peculiarity of construction in order to adapt her to some special purpose out of the usual course of shipping, precludes there being any market value for her. An instance of this may be when a vessel is built for a special trade requiring peculiar and unusual conditions in her construction. In such a case, for want of a better criterion of value, cost of construction or purchase price, with a deduction for depreciation by ordinary wear and age, may be resorted to. (See Lowndes

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on Collisions, 141 to 146.) But the present case does not fall within the exception. The commissioner had before him both classes of evidence stated in the rule, and although the evidence may be open to criticism in some respects, I think it was amply sufficient to justify his finding.

The exception to the allowance of \$25,000 for the value of the vessel is, therefore, overruled.

Second—As to the amount allowed for freight. This exception was in part submitted to at the hearing, and it was conceded that there should be deducted from the amount allowed by the commissioner \$457, for future expenses in earning the freight.

The freight upon the 65,000 bricks was allowed by the commissioner at the rate of \$5 per thousand. Respondent contends that this is more than the testimony warrants. Hudson, the libellant, testified that the freight on the brick was either four or five dollars per thousand—that he was quite sure it was five dollars. This was a fact to be made out by libellant, and it ought not to be left uncertain, especially where, as in this case, it is susceptible of certainty of proof. The most that can be made of Hudson's statement is, that the freight on the brick was not less than four, nor more than five dollars per thousand; and I think that, at the most, the allowance ought not to be more than a medium between the two sums, or four dollars and fifty cents per thousand. Fifty cents per thousand amounting in the aggregate to \$32 50, must therefore be deducted from the allowance made by the commissioner, in addition to the \$457 before mentioned, making the whole amount to be deducted \$489 50, to which interest must be added.

The exception to the amount allowed for freight is, therefore, sustained.

Amount to be deducted.....	\$489 50
Interest from May 11, 1869, the date of the collision, to April 8, 1872, the date of the report, at 7 per cent.....	99 94
	<hr/>
	\$589 44

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This amount must be deducted from the aggregate amount of the commissioner's report, viz., \$34,264 70, and a final decree must be entered in favor of libellant for the remainder, viz., \$33,675 26, with interest from April 8, 1872, the date of the commissioner's report, and costs of suit.

Ordered accordingly.

THE SUNNYSIDE.

MAY, 1872.

DAMAGES.—DEMURRAGE.—MASTER'S WAGES.

Where a tug injured by a collision was a member of an association, into which each boat was put at an appraised valuation, and each drew its *pro rata* share of the net earnings of the whole, according to its valuation, the dividends paid by the association during the time the tug was laid up for repairs were held to furnish a proper basis for demurrage.

Demurrage cannot be allowed for unnecessary or unexplained delays.

The salary and board of the master while superintending the repairs was also held a proper charge.

When the contract for raising the tug was let at a specific sum, with the proviso that the contractor should have the use incidentally of any other tugs belonging to the association, the services of these tugs were held a proper item of damages.

ON exceptions to the commissioner's report.

The bark Sunnyside was libelled by John Miner, owner of the tug Goodnow, for collision, and a cross-libel was filed against the Goodnow. Both vessels were held in fault, and a division of damages was decreed, and it was referred to a commissioner to ascertain the damages. The commissioner having made his report, the owner of the Sunnyside comes in and excepts to certain items allowed by the commissioner.

In the following opinion only those exceptions are noticed which were insisted on at the hearing and in the briefs furnished.

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Messrs. *F. H. Canfield* and *Geo. V. N. Lothrop*, for the exceptions.

Mr. H. B. Brown, contra.

LONGYEAR, J. 1. As to the item for demurrage, three months at \$1,500 per month, \$4,500.

The owner of the *Goodnow* was a member of an association called "The Detroit and St. Clair River Towing Association," composed of owners of towing-boats at the port of Detroit. Each boat was put in at an appraised valuation, and each drew its *pro rata* share of the net proceeds of the earnings of the whole, according to its valuation. The appraised valuation at which the *Goodnow* was put in was not shown before the commissioner, but it is now shown by a stipulation between proctors to have been \$23,000. The evidence shows that for the navigation season of 1869, in which the collision occurred, the net proceeds were 11 per cent. upon the appraised valuation; and it is now agreed that these *data* constitute the correct basis of damages for demurrage, which agreement is in entire accord with the opinion of the Court. It is also agreed that the season of navigation is comprised in the eight months commencing April 1st and ending November 30th; but advocates are not exactly agreed as to the length of time the *Goodnow* was necessarily detained on account of the collision. They differ, however, only one quarter of a month, respondents conceding two months, and libellant claiming two and one-quarter months.

The collision occurred June 14th, 1869, and the repairs were completed and the *Goodnow* commenced running September 30th, 1869, as appears by the proofs. This comprises a period of three and one-half months. Damages for detention can be allowed only for such time as was necessary to raise the vessel and make the necessary repairs. Nothing can be charged for unnecessary or unexplained delays. This is conceded. John Miner, libellant, testified before the commissioner as follows: "I commenced raising her nearly three weeks after she sunk. There was a delay of nearly a month after she got to Detroit

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before she commenced repairing." These delays are not explained, and it is conceded that some deduction ought to be made on account of them. I think the deduction of one month and a half claimed by respondent's advocates is little enough, and that an allowance for two months is liberal.

The exception to the allowance for demurrage is, therefore, sustained in part, and a deduction from the amount allowed must be made as follows: Eleven per cent. on \$23,000 is \$2,530 for the season of eight months. This would give \$632 50 for two months, as the correct allowance for demurrage. The deduction, therefore, to be made from the gross allowance made by the commissioner is \$3,867 50.

2. As to the item for John Miner's board and wages, \$345.

The objection to this item is that it does not appear what he did, or that his services were necessary. Miner was master as well as owner of the Goodnow, and, of course, in his capacity of master, his time was worth whatever it would cost to hire a man in that capacity. The collision, of course, threw him out of employment, and, instead of engaging in other employment, it appears from his testimony that he actually worked during the time of the detention of the Goodnow in raising and repairing her. I think, under all the circumstances, he ought to be allowed for his time and board during the necessary detention of the vessel, which, as we have seen, was two months. The rates charged are \$100 per month wages, and \$15 per month for board. These rates were allowed by the commissioner, and I think correctly. In fact no objection is made on that account. But as the allowance was made by the commissioner for three months, the exception must be sustained in part, and a deduction of \$115 must be made from the amount allowed by the commissioner for the one month's excessive allowance.

3. As to the items for use of the tug Park, at \$900, Sweepstakes at \$150, and Bob Anderson at \$300. The raising of the Goodnow was let to one Ballentine for \$2,500, and these tugs were used by him in that service. The objection to these items is that these tugs belonged to the association, and, having let the entire contract to Ballentine for a fixed sum, they must

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get their pay of him, or if they saw fit to donate the use of the tugs to him, they cannot charge the same to the respondents—in other words, that all the respondents are liable for is the amount for which the contract was let.

The proof shows that these tugs belonged to the association. Ballentine, the contractor, testifies that he took the job of raising the Goodnow at \$2,500, and was to have the services of the tug Park in addition; that he found the services of other tugs necessary, and employed the Sweepstakes and the Bob Anderson of the association; that the association, finding he had lost money, donated to him the services of the two last named tugs. This testimony settles the matter against the exception, and in favor of the allowance by the commissioner, so far as the tug Park is concerned. In regard to the other two, Mr. Livingstone, the treasurer of the association, in his testimony, states the contract with Ballentine as follows: "A contract was made with J. M. Ballentine to raise her for \$2,500, and deliver her at a dock in Detroit, with the understanding that he was to have the use of the tug T. F. Park, without charge or expense, *and also that he was to have the use, incidentally, of any of the other tugs of the association* which he might require, without charge or expense." And on his cross-examination he says: "The three tugs and the incidental help were furnished to Ballentine without charge on the part of the association. That was part and parcel of the contract." And this testimony is not in any manner contradicted, unless a contradiction may be inferred from Ballentine's testimony. But I do not think such mere inference sufficient to do away with Livingstone's positive statements. These allowances were, therefore, correct, and the exception to them is overruled.

Ordered accordingly.

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THE MICHAEL GROH.

MAY, 1872.

DAMAGES.—EXPENSES OF GETTING OFF.—PROTEST.

Where a vessel is aground amidships, and in danger of springing a leak, and wetting a valuable cargo, Courts will not, as against the party by whose negligence she was grounded, scrutinize very closely the expense of getting her off, provided the master has acted in good faith.

The expense of a protest made before unloading, will be allowed, though it proves to be unnecessary.

On the libel of James Cooper and Robert Meginnity, owners of the schooner *Columbian*, for negligent towing and grounding of the schooner on a reef above Belle Isle, in Detroit river, June 9th, 1871.

Libellants claimed damages for lightering, services of tugs and services of men in getting the schooner off, for damage to cargo, repairs, demurrage, etc., to the amount of \$2,500.

The answer admitted the towing and grounding of the schooner, but denied that the grounding was caused by negligence, or any fault on the part of the *Michael Groh*, or that the latter was liable for any part of the damages claimed.

Mr. *W. A. Moore*, for libellant.

Mr. *H. B. Brown*, for claimant.

LONGYEAR, J. On the hearing, it was conceded that the *Michael Groh* was in fault, and that she is liable for all proper damages in consequence of the grounding of the schooner, including all necessary expenses in getting her off. The only contest there is relates to certain items of expenses and damages claimed by libellants. The items objected to, and

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the objections raised, will be taken up and considered in their order :

First. As to the services of the tug U. S. Grant, eleven hours, at \$20 per hour, \$220. The objections to this item are, first, that by an agreement between the master of the schooner, and the master of the Michael Groh, the latter was to get the schooner off at the expense of the Groh, and it is claimed that by virtue of this agreement, the master of the Groh had the right to select the means, and that the U. S. Grant was employed by the master of the schooner against the consent of the master of the Groh, and in violation of the tenor and effect of the said agreement; second, that the U. S. Grant was retained longer than was necessary, and after it clearly appeared that the vessel could not be got off by her; third, that it was poor judgment to attempt to pull her off without first lightering.

Soon after the grounding of the schooner, there was some conversation between the two masters about getting the schooner off; but the evidence fails to satisfy me that it amounted to anything more than a recognition by the master of the Michael Groh of his liability for the grounding, saying at the same time that he would get her off. The future conduct of the two masters would seem to indicate that this was all there was of it, and that they in fact worked in concert, each doing all he could, according to his best judgment, to accomplish the result. About the only difference between them, so far as I can discover from the evidence, was in what appeared to be the controlling motive of each in what he did or refrained from doing. On the part of the master of the schooner it seemed to be expedition—to get his vessel off in the shortest possible time, regardless of expense. On the part of the master of the Michael Groh it seemed to be economy in the expenses—to get her off, but to do it with the least possible expense, even if it involved more or less delay.

The evidence shows that the schooner got aground about nine o'clock in the afternoon of June 10th, 1871. After the Michael Groh had pulled upon her for some time, and long enough to satisfy them that she could not pull the schooner off

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without aid, the two masters went to Detroit in quest of aid. Early the next morning they applied to the owner of the tug U. S. Grant, but the master of the Michael Groh objecting to his terms, they left in quest of cheaper aid. After spending an hour and a half or two hours in a vain search, the master of the schooner returned to the owner of the U. S. Grant and engaged her at twenty dollars per hour, and one hundred dollars for use of hawser. This was done without any further consultation with the master of the Michael Groh, and without his having withdrawn the objection made by him in the morning. This illustrates the controlling motives of the two masters as before suggested—the one being all for expedition, and the other all for economy. But let us see what justification there was for the master of the schooner to do as he did. His vessel was heavily laden with wheat. She was aground nearly amidships, both ends being clear of the bottom. She was in great danger of straining and springing a leak, and thus not only damaging her hull, but causing great damage to the cargo by wetting. Every hour's delay tended to precipitate these results. And in addition to these facts, the agent of the insurers of the cargo was urging expedition. It was under these circumstances that the master of the schooner engaged the services of the tug U. S. Grant as he did. I think he was fully justified in doing so. He had, in my opinion, been even liberal with the master of the Michael Groh in waiting for him as long as he did, and aiding him to find cheaper aid. He could hardly have been justified to his owners and the underwriters in waiting longer.

After the U. S. Grant had been employed and had commenced operations, the master of the Michael Groh succeeded in obtaining the gratuitous services of the United States revenue cutter Fessenden to aid in pulling the schooner off. The united forces of the Fessenden, the U. S. Grant and the Michael Groh, however, proved unavailing. It was then determined to lighten the schooner, and the U. S. Grant was retained to pull upon her from time to time while the lightening was going on, so as to diminish the necessity for lightening as much

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as possible. It was this retention of the Grant that constitutes the second objection to the allowance for the services, in part. I think her retention was for a proper and legitimate purpose, and that the objection is therefore untenable.

The third objection to the allowance for the services of the U. S. Grant is, that good judgment required that the schooner should have been first lightened before attempting to pull her off. The necessity of lightening was not so evident before an attempt to pull her off had been made as to make such attempt unjustifiable. It was, in fact, mere matter of speculation, whether she could or whether she could not be got off without lightening. If she could be got off without it, then it was the duty of those in charge to do so, and they could ascertain only by trying. But beyond all this, if there was any mistake of judgment here, it was a mutual mistake, and the respondents are estopped from claiming any advantage on account of it.

The item for services of the tug U. S. Grant is allowed at the amount claimed by libellants, \$220.

Third. As to the item for services of the schooner Nettie Howard, lightening, \$480. The proof shows that the employment was by the hour, at \$8 per hour. The objections are, first, that the rate per hour is extravagant; that a vessel could by reasonable diligence have been obtained for \$3 per hour, which would have answered the purpose; second, that the proof fails to show a sufficient length of time to come to the amount charged, even at the rate paid.

The first objection is not sustained by the proofs. There was some proof that there was an open scow somewhere within reach, which might have been obtained at \$3 per hour. In the first place there is no proof that the master of the schooner knew that fact. If it was his duty to ascertain it, it was equally the duty of the master of the Michael Groh to not only to ascertain it, but to inform the other of it. It is true the master of the schooner seems to have employed the first vessel he could find; but, under the circumstances, respondents have no right to be very nice in their requirements of diligence on the part of the vessel in peril, in order to save

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a few dollars to the vessel by whose fault the peril accrued, when such diligence involved loss of time and consequent added peril to the vessel. And, in the second place, I do not think it would have been prudent to employ an open scow as a lighter, in view of the nature of the cargo.

The second objection to this item is sustained. The length of time the Nettie Howard was employed, as shown by the proofs, and as conceded in the argument, was 47½ hours, which, at \$8 per hour, amounts to \$380. The Nettie Howard was a Canadian vessel, and the difference in the two currencies was made up, being twelve per cent. at that time; this must therefore be added to the above amounts, making a total of \$425 60, at which amount the item for services of the Nettie Howard for lightening is allowed, in lieu of \$480, as claimed.

Sixth. As to the item for expenses of protest, \$7 75. The objection to this item is that protest was unnecessary.

On arriving at Buffalo, the destination of the schooner, the master, not knowing how badly the cargo might be injured, as a prudential step with reference to the insurance on the cargo, got out protest papers before unloading. Now, while protest was unnecessary to charge the Michael Groh, yet it was, to say the least, prudent under the circumstances, for the purpose above stated, and I think it ought to be allowed.

The item for expenses of protest is, therefore, allowed at the amount actually paid, \$7 75.

The remaining exceptions involved simply questions of fact.

Exceptions overruled.

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THE BALIZE.

JUNE, 1872.

WAGES.—SEASON OF NAVIGATION.—DESERTION.—FORFEITURE.—
MITIGATING CIRCUMSTANCES.

Where a seaman is hired at a certain sum "for the season" of navigation, the presumption is, that the service is for the entire season.

The "season of navigation" as understood upon the lakes, comprises the eight months commencing April 1st, and ending November 30th.

Leaving a vessel before the expiration of the time of service, without the consent of the master, with the intention not to return, constitutes desertion by the maritime law.

Such desertion works a forfeiture of all antecedent wages, unless a reasonable excuse be shown, founded upon gross misconduct or harsh usage.

Slight and transient causes, such as the fact that the meat used on board was for a short time slightly tainted, do not constitute such an excuse as to relieve from forfeiture.

LIBEL of George M. Granger for seaman's wages.

The libel set forth the hiring of libellant to serve as sailing master on the tug Balize, at the rate of \$1,200 for the season, and five per cent. commission on the net earnings of the tug; that in pursuance of this contract, he entered into the service of the tug about the first of March, and so served until the twentieth of July, and claimed a balance due him of \$860 10.

The answer admitted the performance of the service substantially as set forth in the libel, but claimed that libellant agreed to serve for the entire season, and that the commission should not exceed three hundred dollars; that he deserted the tug on the twentieth of July, and took with him the mate, two wheelmen, and the lookout, and that by reason of his desertion, claimants suffered damage in about the sum of \$5,000.

Mr. *H. B. Brown*, for libellant.

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The agreement to serve at \$1,200 per season, and five per cent. commission, does not legally import a hiring for the entire season, but for an indefinite time, giving either party the power to terminate the same at pleasure, provided the time and place be reasonable (*Heim v. Wolf*, 1 E. D. Smith, 70; *White v. Atkins*, 8 Cush. 367; *Rossiter v. Cooper*, 23 Vt. 522).

Libellant's leaving the vessel was no desertion as understood by the maritime law. The rigid doctrine of desertion, as administered upon the ocean, has no application to contracts by the season, or service upon harbor tugs; certainly not to persons acting in the capacity of master. But whether this be so or not, claimants ought only to be permitted to recoup the damages actually suffered by his leaving the tug, for nothing is better settled than that desertion does not necessarily work a forfeiture of the entire wages (2 Pars. on Ship. 94, 100, note 5; *Swain v. Howland*, 1 Sprague, 424; *Macomber v. Thompson*, 1 Sum. 384; *The Maria*, Bl. & How. 331; *The Moslem*, Olcott, 300; *The Mentor*, 4 Mason, 84; *Gladding v. Constant*, 1 Sprague, 74; *Scott v. Russell*, Abb. Adm. 258; *Gifford v. Kolloch*, 19 Law Rep. 21; *Cloutman v. Tunison*, 1 Sum. 373; *The Neptune*, Gilpin, 89; *The Elizabeth Frith*, Bl. & How. 195; *The Martha*, Ibid. 151; *The Union*, Ibid. 545).

This Court should proceed by analogy to a Court of common law, and award libellant what his services were really worth to respondents.

Although the Court may hold that the unwholesome food furnished by the owner, and his interference in the management of the boat, was not such as to justify a desertion in the ordinary sense of the term, still I claim this may be considered by the Court in palliation of the offense, if for these reasons the position of libellant was rendered uncomfortable and disagreeable to him.

An attempt was made to prove a large amount of damage suffered by the claimants, but it failed completely, and was virtually abandoned. There is not a particle of evidence showing that he induced others to leave with him.

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Libellant's services in fitting out the vessel, and his board during that time, were all under his contract to serve as sailing master, were *incidental and subsidiary* to it, and he is entitled to recover for them, though he could not maintain a suit in admiralty for them as an independent cause of action (*The Mary*, 1 Sprague, 204; *The Canton*, Ibid. 437; *The Scattergood*, Gilpin, 1; 2 Pars. on Ship. 185, 186; *Wells v. Osman*, 2 Lord Ray. 1044; s. o. 6 Mod. 238; *The Saratoga*, 2 Gall. 164; *Pitman v. Hooper*, 3 Sum. 50; *The Thos. Jefferson*, 10 Wheat. 428; *The Phæbus*, 11 Pet. 175; *The Gazelle*, 1 Sprague, 378).

Libellant is also entitled to recover here his commission upon the earnings which were given him incidentally as part payment for his services. The old doctrine of the English Courts, that denied jurisdiction in admiralty wherever a special agreement existed between the seamen and master, was wholly overthrown in *Coffin v. Jenkins* (3 Story, 108), and since that case was decided, American Courts have repeatedly taken cognizance of these claims (*Reed v. Hussey*, Bl. & How. 525; *Tompkins v. Howard*, 1 Sprague, 167; *The Crusader*, Ware, 437).

And references are frequently made to an assessor to estimate the net profits (*The Hibernia*, 1 Sprague, 78; *The William Martin*, Ibid. 564; *Swain v. Howland*, Ibid. 424; *Hazard v. Howland*, 2 Sprague, 68; *Duryee v. Elkins*, Abb. Adm. 529).

The obligation to provide proper food, renders it necessary that the master should provide such food as is usual in vessels engaged in that kind of business (*The Cyrus*, 2 Pet. Adm. 411; *Foster v. Sampson*, 1 Sprague, 182; *The Mary Paulina*, Ibid. 45; *Collins v. Wheeler*, Ibid. 188).

Mr. W. A. Moore, for claimants.

LONGYEAR, J. There was no disagreement between the parties, at the hearing, that the wages of libellant were to be at the rate of \$1,200 for the season of navigation, and five

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per cent. on the net proceeds of the earnings of the tug, but not to exceed \$300 in addition to the \$1,200. The only matter in dispute in this regard was, whether libellant had the right to leave at any time before the close of the season of navigation, the libellant contending that he had such right, and respondents contending that he had not.

The rate of wages being by the season, the presumption is that the service was to be for the entire season. If the contract was different from that, and libellant was to have the right to leave at any time, the burden was upon him to prove it. Libellant testified that he was to have that right. Thomas Murphy, master and part owner of the tug, with whom the contract was made, testified that such was not the contract, that, in fact, nothing of that kind was mentioned. These witnesses being equally interested, and standing in other respects equally fair, the evidence is equally balanced, and the proposition of libellant is not sustained. The case must, therefore, proceed on the basis of a contract to serve for the entire season.

The proofs showed that libellant left the service of the tug without consent, and with the intention not to return, before the close of the season; the defense of desertion, therefore, is pertinent, which defense it now remains to consider.

"The season of navigation," as understood here upon the lakes, comprises the eight months commencing April 1 and ending November 30. A contract, therefore, for the season of navigation, whether for wages or otherwise, must be presumed to have been intended to cover that period of time, where nothing to the contrary appears. The contract in this case, therefore, commenced to run April 1, notwithstanding, as appeared by the proofs, the tug did not go into commission and commence running until about April 25. It is in proof that libellant left the vessel, as above stated, July 20. His wages during that period, April 1 to July 20 (three months and twenty days), at \$1,200 for the season of eight months would be \$550. The five per cent. on the net proceeds was limited by the contract, as we have seen, to \$300 in the aggre-

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gate, for the entire season. As it was in proof that the five per cent. exceeded that amount, the *pro rata* share for the three months and twenty days libellant served would be \$137 50. This, added to the \$550, would make \$687 50 *pro rata* of the wages agreed upon applicable to the time of actual service. From this we would have to deduct \$110 paid libellant while he remained in service, leaving a balance of \$577 50 as the extent to which libellant would be entitled to recover in any event.

Libellant served one month before the 1st of April, when, as we have seen, his contract commenced to run, overseeing repairs on the tug at Detroit, the home port, and he claims to recover also for that at the contract price. But it clearly did not come within the time limited by the express terms of the contract—the season of navigation; neither did it constitute any part, as incidental or otherwise, of the duties he contracted to perform, viz., those of pilot or sailing master. Inasmuch, therefore, as that service did not come under the contract, and as at that time there was no lien and no process *in rem* on account of such service, no allowance could be made for it in the present form of action, in any event. The same reasoning applies to libellant's claim for his board during the same time, and for money loaned to the master.

The question then recurs, is the defense of desertion sufficient to defeat libellant's claim, in whole or in part?

1. As to the fact of desertion. As we have already seen, libellant quit without consent, and, as the proof shows, he did so against the express dissent of the master, and with the intention not to return. This constitutes desertion by the maritime law, unless he has made out a sufficient justification. The grounds of justification sought to be proven, viz., interference with his duties by the master, and unwholesome and insufficient food, I am satisfied are mere after-thoughts, and constituted no part of his reasons for leaving. He never made any complaint, nor did he at the time give those as the reasons for his leaving. In any view of the case, however, I do not consider the justification contended for sustained by the proofs.

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In fact, I am satisfied from the proofs, that libellant's only reason for leaving was that he had obtained other and perhaps more agreeable employment. The charge of desertion is, therefore, maintained as a matter of fact.

2. As to the effect of the desertion. By the strict rule of the maritime law, desertion works an entire forfeiture of all antecedent wages, and such must be its effect in this case, unless there is something that mitigates the offense. In the case of *The John Martin* (2 Abb. U. S. Rep. 183), which, like the present, was a case of desertion from a tug-boat, this Court made use of the following language: "It is true the kind of service under consideration does not call for the same rigorous application of the law as ocean service, because there the consequences of desertion may be vastly more serious. The Court may in its discretion alleviate the rigor of the general rule, and, in view of mitigating circumstances, may impose a less penalty than that of entire forfeiture of wages." To this doctrine I fully adhere. See, also, *Louvrein v. Thompson* (Sprague, 355); *Swain v. Howland* (Ib. 424, 426); *Gifford v. Kollock* (19 Law. Rep. 21, 25); *The Union* (1 Bl. & H. 545). The mitigating circumstances, however, must be such as to amount to a reasonable excuse, founded on gross misconduct or harsh usage. Slight and transient causes will not answer, especially where, as in this case, the desertion appears to have been deliberate and premeditated, and not the result of sudden impulse. Neither is it necessary, in order to maintain this defense, that it shall be made affirmatively to appear that any specific damages resulted from the desertion. Where this does appear, however, it will operate as an aggravation. Where, however, it is made affirmatively to appear that no damages resulted or could have resulted, the rule may be applied perhaps with less rigor.

The excuses contended for at the hearing, were: first, that the master interfered with libellant in the discharge of his duties; and, second, unwholesome and insufficient food. These have already been noticed in connection with the question of justification for desertion, and they were held insufficient for

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that purpose. Did they amount to a reasonable excuse? The proofs show that the only interference with libellant's duties by the master, consisted in orders, directions and advice to the former as pilot and sailing master, where to go and what to do in the employment of the boat. This was clearly nothing more than a legitimate exercise of the powers and functions of master, and did not constitute even a shadow of ground for complaint. The complaint of insufficiency of food is wholly unsupported by the proofs. The proofs show, however, that for a short time, meat was used that was slightly tainted. This, however, was but transient and of short duration; and the master explains that it was owing to circumstances at the time beyond his control. Libellant evidently so considered it, because he made no complaint of it at the time, and he remained in the service a considerable time after this cause of complaint had ceased. I am satisfied from the proofs that the main reason for his leaving was personal to himself, and for his own benefit. This, instead of being a mitigation, is rather an aggravation of the offense.

The best men are usually employed here, upon the lakes, before the commencement of the season of navigation; it is difficult to get good men after that time, and it will not do to encourage mariners to treat their contracts for service lightly, to break them at pleasure, and thus place owners at the mercy of their caprices and whims; and I desire it to be understood that the Court looks upon all desertion, which is not fully justified, with disapprobation, and that the extreme penalty of the law will be inflicted in all cases where the party deserting has not a strong excuse, founded on gross misconduct or harsh usage towards him.

In the view already taken, it is unnecessary to consider the claim of damages in consequence of the desertion. It is proper to remark, however, that although the respondents failed to establish such a state of facts as would constitute a basis for any specific measure of damages, yet sufficient appears from which it is fair to presume that damage to the owners must have resulted from the desertion. It is conceded

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on all hands that libellant possessed superior skill in the position in which he was employed, and that his services were also peculiarly valuable on account of his extensive acquaintance and popularity with owners and masters of vessels usually employing tugs, and also, on account of his knowledge of towing rafts, which this tug proposed to and did make somewhat a specialty. In place of libellant, the owners were obliged to take up with a man of qualifications inferior to libellant's in all respects; and although it is in proof that the remainder of the season was much less profitable for the towing business than that portion during which libellant served, yet it is fair to presume that with libellant's superior knowledge, skill and reputation, the tug would have earned much more than she did earn—how much more it would be impossible, as it is unnecessary, to determine. All that I intend to say, and all that is necessary to say here, is, that the owners were undoubtedly materially damaged by the desertion.

We see, therefore, the case has all the elements necessary to give the rule of the maritime law its full force, without any mitigating circumstances to break or alleviate it. It is therefore held that the balance due libellant for wages, as above stated, is forfeited, and the libel must be dismissed with costs.

Libel dismissed.

NOTE.—This case was appealed to the Circuit Court. Pending the appeal, libellant brought suit for the same cause of action at common law, in the State Court. The State Court having, on motion, stayed the proceedings, the Supreme Court vacated this order by mandamus (27 Mich. 406), and directed the case to proceed to judgment. Before the trial, of the case, however, the above decree of the District Court, dismissing the libel, was affirmed by the Circuit Court on appeal. This decree was then pleaded in the State Court, as *res adjudicata*, but was overruled, and a verdict rendered for the plaintiff for \$602. The case was then removed to the Supreme Court of the State, by writ of error, where the judgment was affirmed at the October term, A. D. 1875. That Court held that the decree of a Court of Admiralty, dismissing a libel *in rem*, was no bar to a suit at common law for the same cause of action.

The Clematis.

THE CLEMATIS.

JUNE, 1872.

EXCEPTIONS TO LIBEL.—NEGLIGENT TOWAGE.—LIABILITY OF AGENT
TO THIRD PERSONS FOR TORTS.

Where a tug, which had agreed to tow a barge from Saginaw to Cleveland, was compelled by stress of weather to turn the barge over at an intermediate port to the master of another tug, by whose negligence she was lost: *Held*, that the owner of the barge could maintain an action for negligence against the second tug.

Quare, whether he could not also support an action for breach of contract.

LIBEL for "negligent towage."

The libel alleged that the barge Mohawk was bound on a voyage from Saginaw to Cleveland, with a cargo of about 200,000 feet of lumber, October 30th, 1870; that on leaving Saginaw the said barge, with five other barges, was taken in tow by the tug Zouave, to be towed through to Cleveland; that on arriving at Port Austin Bay, the weather was so threatening that the master of the tug Zouave, then having the said barge so in tow, requested the master of the tug Clematis, which then lay at anchor in said Port Austin Bay, to take the said barge Mohawk, together with two others of the said barges, and tow them through to St. Clair river. The libel then proceeded as follows:

"4. That in compliance with said request the said tug Clematis, which was then engaged in the business of towing vessels, barges and rafts over the proposed route to St. Clair river, took the said barge Mohawk, together with the said barges Mills and Hollon, in tow for the said river, and it then and there became and was the duty of the said tug Clematis to exercise ordinary care and skill and good seamanship in the management of the said barges; and the master of the said tug Clematis thereupon impliedly undertook and agreed to tow said barge Mohawk safely through to said river."

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The libel then charged the tug with having cast off the barge's line and abandoned her to her fate in a rough sea, nearly abreast of Pointe aux Barques, without just cause, by means of which the said barge was foundered and lost, with her entire crew.

The claimants put in an answer to the libel, and accompanied the same with an exception to the said fourth article, as follows: "And your respondents hereby except to said libel and said article: for that it does not allege that respondents or the master of said tug undertook and agreed either with said libellant, or with the master of said barge, or any other person, to do said towing, so as to give said libellant any right of suit; and respondents pray the same benefit of this exception as if they had filed a separate exception."

Mr. *Alfred Russell*, for the exceptors.

The description of the action, taking the introduction in connection with articles 4 and 5, is a cause of *contract*, civil and maritime. In such case the jurisdiction depends on the subject-matter (*Waring v. Clarke*, 5 How. 459, 462). No privity of contract between the owner or master of the tug and the owner or master of the barge is anywhere set forth in the libel. There can be no such thing as a contract without *parties*—at least two in number—and a consideration moving from one to another.

Although the rules of pleading in admiralty are not technical, yet the parties to the contract, the contract itself, and the consideration must be distinctly set forth (*Jenks v. Lewis, Ware*, 51). Claimants may object for want of proper parties, or for absence of detailed allegations of fault (*The Commander in Chief*, 1 Wall. 43–52). Who were the parties is a fact necessary to be alleged (*The Havre and Scotland*, 1 Ben. 299). As much certainty is required as in a declaration or plea at common law (*Treadwell v. Joseph*, 1 Sum. 391; *Pttingill v. Dinsmore*, Daveis, 208).

The libel cannot be sustained without an allegation that the

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master of the tug contracted with the libellant himself or the master of his barge. The facts show that libellant's only remedy is against the tug Zouave, whose master contracted with libellant to do the towing, and who subsequently on account of the weather requested claimants to help him.

Messrs. *W. A. Moore* and *H. B. Brown*, for libellant.

There are no technical rules of pleading in admiralty, and it is only necessary to state the facts; but even in a common law declaration it is unnecessary, in an action of tort, to state the consideration for the contract, from the breach of which the tort has arisen (1 Chitty on Pl. 417; *Elsee v. Gatward*, 5 T. R. 143; *Webster v. Hodgkins*, 25 N. H. 128; *Barney v. Dewey*, 13 Johns. 224; *Corwin v. Davison*, 9 Cow. 22; *Moseley v. Wilkinson*, 24 Ala. 411).

The great case of *Coggs v. Bernard* (2 Ld. Raym. 909), upon which the entire modern law of bailments is founded, holds that a person who undertakes gratuitously to do a service for another is yet liable for negligence in the performance of it. This is still the law (*Phila. R. R. Co. v. Derby*, 14 How. 468; *The Deer*, 4 Ben. 352; *The Brooklyn*, 2 Ben. 547).

It is claimed in this case that the Clematis was merely the agent of the Zouave; that no liability was incurred except to the principal, and that the action should have been against the Zouave. It is true that an agent is not liable to third persons in an action of *tort* for a *non-feasance*, omission or neglect of duty (Story on Bailments, § 404, and cases cited; Sher. & Red. on Negligence, 128).

But where an agent has been guilty of a *misfeasance*, violation of duty, or of negligence in the performance of a public employment, there is no doubt of his liability to third persons (Sher. & Red. on Negligence, 129, 130; *Phelps v. Wait*, 30 N. Y. 78; *Wright v. Wilcox*, 19 Wend. 343; *Suydam v. Moore*, 8 Barb. 358; *Montfort v. Hughes*, 3 E. D. S. 591; *Hewett v. Swift*, 3 Allen, 420; *Johnson v. Barber*, 5 Gilm. 425; *Sprights v. Dudley*, 39 N. Y. 441; *The R. B. Forbes*, 1 Sprague, 328;

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The Rescue, 2 Ib. 16; *The John Fraser*, 21 How. 184; *Sturgis v. Boyer*, 24 How. 110; *Sawyer v. R. & B. R. R. Co.* 27 Vt. 377).

The following authorities indicate that, in cases like the present, an action would lie as upon a *contract*. Certainly it would, if the case has any analogy to those of common carriers (2 Red. on Railways, 14; *The New Jersey Steam Nav. Co. v. The Merchants' Bank*, 6 How. 344; *Sanderson v. Lambertson*, 6 Binn. 129).

LONGYEAR, J. The case has been argued and submitted on the exception, before proceeding to a hearing on the merits. Other objections to the libel were raised at the hearing, but as the above is the only exception found stated in the pleadings, it will be the only one noticed.

The argument in support of the exception proceeds upon the assumption that there is no privity of contract between the barge and the tug Clematis. The right of action in this case does not necessarily rest upon breach of contract. It has a sufficient foundation in tort. The casting off of the barge's line and abandoning her to her fate in time of peril, as charged in the libel, was a misfeasance. It was a violation of a duty toward the barge, which had become incumbent on the tug by her taking the barge's line and towing her to the place of danger, in which she is charged in the libel with having left the barge to her fate, without just cause. No matter whether the tug so took the barge's line and did such towing with or without a contract with the barge. In other words, after she had taken the barge's line and towed her to a place of danger, it was the tug's duty to retain the line and stand by her so long and so far as possible, and for a breach of that duty an action will lie (Sher. & Red. on Negligence, § 112; see, also, opinion of Justice Woodbury, 6 How. 418).

And even upon the basis of a breach of contract, I am inclined to think that, upon the authority of the decision of the United States Supreme Court, in the case of *The New Jersey Steam Nav. Co. v. Merchants' Bank* (6 How. 344, 380), the

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action will lie. But from the view already taken, it is unnecessary to discuss this aspect of the case.

Exception overruled.

THE MASTEN.

JUNE, 1872.

COLLISION.—WEIGHT OF EVIDENCE.—SPEED IN ENTERING A
HARBOR.

Evidence of verbal statements made in time of excitement and peril should be received with great caution, and when opposed to the direct and concurring testimony of many witnesses, is entitled to but little weight.

A sailing vessel entering a crowded harbor at the rate of six miles an hour, in addition to a favorable current of four miles, condemned for too great speed.

LIBEL for collision by Frederick H. Blood, owner of the schooner Maid of the Mist.

The collision occurred at about 2 o'clock in the morning of the 10th day of September, 1871, in the St. Clair river, a short distance below Port Huron, and opposite the Port Huron Middle Ground, so called. The schooner was lying at anchor, in about mid-channel, and the bark was coming down the river, bound on a voyage from Chicago to Buffalo, laden with wheat. The starboard bow of the bark struck the schooner on the starboard side, carrying away her jibboom and head gear, and her foremast head, breaking her starboard stanchions, and driving her anchor into her, and inflicted such injuries that she sunk in about an hour and a half. The night was dark, although it was a good night to see lights. There was a large

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number of vessels at anchor in the river, variously estimated by the witnesses at from thirty to seventy or eighty. The channel was somewhat narrow, although there was ample room for vessels exercising ordinary care and skill to pass. The wind was blowing a stiff breeze down the river, and was consequently free to the bark. The current at that point was about four miles an hour. The bark had up her mainsail, mainstaysail, topsail, and three jibs, and was running at the rate of about six miles an hour through the water, and about ten miles by the land. Her mainsail was being taken in at the time of the collision. Thus far the facts were undisputed.

Mr. *H. B. Brown*, for libellant.

The master was clearly in fault for running at too great speed.

The following facts are not disputed :

First—That the wind was blowing almost a gale from the northerly, and was a fair wind for the Masten as she came down the river.

Second—That she was passing through the water at six miles an hour.

Third—That, with the addition of the current, she was actually approaching the schooner at ten miles an hour.

Fourth—That no sails had been furled from the time she entered the river, and only a reef taken in her topsails.

Fifth—That there were from fifty to eighty sail in the river, that had taken refuge there from a storm in the lake. These vessels were lying upon both sides and in the center of the river.

It was the duty of the bark to furl all her canvas, except what was absolutely necessary to preserve her steerage way, or to come to anchor before she reached the schooner (*The Morning Light*, 2 Wall. 550, 558; *The Virgil*, 2 W. Rob. 202).

Mr. *W. A. Moore*, for claimant.

Mr. Moore's brief discusses simply the question of fact.

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LONGYEAR, J. The main and only disputed essential fact in the case is, whether the schooner had up her proper anchor light; and it is conceded that if she had, then the bark is in fault, and must respond in damages. Too great speed is also charged as a fault against the bark; but this can be of importance only in case it shall be found that the schooner had not up her proper light, and then only on a question of division of damages. The question as to the schooner's light will, therefore, be first considered.

The testimony on the part of the libellant shows that from the force of the wind and current the schooner dragged her anchor a considerable distance before she came to, and that she came to only a few minutes—fifteen or twenty—before the collision.

John Jones, master of the schooner, testifies that immediately upon coming to anchor, he took in the colored lights, and hung a bright light in the fore-rigging on the port side. He then describes the lamp or lantern, and its height from the deck, &c., but as no question is made in these respects, it is unnecessary to repeat his testimony.

Hannah Dell, the cook, testifies that she trimmed the bright light, and handed it to Capt. Jones, in the cabin, when he brought in the colored lights.

James M. Jones, son of Capt. Jones, and who was on the lookout on the schooner, testifies that he saw his father hang up the light, and that it burned brightly.

Oscar Hill testifies that he was on deck several minutes after the schooner came to anchor, and that he distinctly saw the light; that he went below before the collision, but on hearing the alarm, came on deck, and at the time of the collision was standing near the fore-rigging; that when the fore-mast head was carried away, the fore-rigging came down with a run and the lamp with it, that the lamp hit him on his back, and that it was then still burning.

Henry Sageman testifies that he was also on deck when the schooner came to anchor, and saw the light hung in the rigging, and that it was burning good.

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Now these five witnesses testify with a particularity of detail which precludes the possibility of their being mistaken. One of two things must be true, either that the schooner had a proper and sufficient anchor light, or that each of these five witnesses has sworn falsely, willfully and deliberately.

In answer to this array of testimony, respondent produces the following:

James Kendrick, master of the bark, testified that he was standing forward near the lookout, when the latter reported to him that he saw a vessel ahead; that by the aid of his glass he distinctly saw a vessel, which proved to be the Maid of the Mist, a little over his starboard bow, and only about 100 feet off, and that he saw no light on her; that he immediately ordered his wheel hard a-starboard, and the collision occurred almost immediately after. He also testifies to a conversation with Capt. Jones, master of the schooner, in which he said to the latter, that it would not have happened, if he, Capt. Jones, had had a light out, and that Capt. Jones replied that he ordered the boys to put one out. Two others of the crew of the bark testify to having heard Capt. Jones make the same statement.

George Johnson, the lookout on the bark, testified to seeing the schooner, and reporting her to Capt. Kendrick, and that he saw no light on her.

The wheelsman on duty, and several others of the crew of the bark, on deck at the time, also testify that they saw no light on the schooner before the collision, but it does not appear that any of them saw the schooner, and I am satisfied they were not in a position to have seen her, or any light there may have been upon her at any time before the collision occurred.

All the witnesses on the part of the bark testify that the first light they saw on the schooner was a light coming out of her cabin soon after the collision.

Besides the above testimony on the part of respondents, a statement made by Hannah Dell, the cook on the schooner, in her testimony, to the effect that when the lamp was brought

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into the cabin after the collision, it was burning dimly and the glass was smoky, is alluded to as evidence that even if a light was out, as testified by the witnesses on the part of the schooner, it was not a sufficient one.

I shall take up and consider the points involved in respondent's testimony in the inverse order in which they are above stated. The condition of the light when it was brought into the cabin after the collision, as stated by the cook, is easily attributable to what happened to it by the collision, and therefore does not necessarily conflict with the statements of the witnesses on the part of the schooner, that it was burning brightly before the collision. The only thing that appears strange to me is that it was not extinguished entirely.

The fact that those on board the bark did not see the light immediately after the collision is, in my opinion, to be attributed to the fact that it came down with the rigging, and was thereby hidden from their view.

The statement sworn to by Capt. Kendrick and two other witnesses on the part of respondents, as having been made by Capt. Jones, that he told the boys to hang out a light on the schooner, is attempted to be explained by Capt. Jones. He says that after the collision he did tell the boys to hang out the light again, and that although he has no recollection of making the statement testified to by Capt. Kendrick and the others, yet if he did make it, it must have been made in reference to that circumstance. Besides this, testimony of verbal statements made and heard in time of excitement and peril must be received with much caution, and when opposed to the direct and positive concurring testimony of many witnesses can have but little weight. If the fact of light or no light rested on Capt. Jones' uncorroborated testimony, then the statement might have considerable force; and perhaps in the light of the testimony of Capt. Kendrick and the lookout on the bark, that they saw no light on the schooner, it would outweigh Capt. Jones' testimony entirely. But Capt. Jones is fully corroborated by the testimony of three eye-witnesses as to the fact of the light being there in its proper position in the rigging, and

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these witnesses stand perfectly fair before the Court. Capt. Jones' testimony may be thrown entirely out of the case, and still there is ample proof that the light was there, by whomsoever it may have been placed there.

There is more force, however, in the statements of Capt. Kendrick, of the bark, and his lookout, that they saw no light on the schooner. It was their business to look for lights, and it is a fair and even strong presumption that there was no light where they saw none. After all, it is a presumption merely, and cannot have the effect in this case, of outweighing satisfactory positive proof of the existence of the fact itself, viz., that there was a light. Capt. Kendrick and the lookout, in making their statement that they saw no light, do not stand in the same position of Capt. Jones and his men in their statement that there was a light. The latter could not be mistaken, while the former might be. The alternative presented in the case of the witnesses for libellant is not presented here. There may have been a light on the schooner, as testified by libellant's witnesses, and still it may be true that Capt. Kendrick and his lookout did not see it, as testified by them. *Why* they did not see it is not necessary for us to inquire. It is sufficient for our present inquiry that there is a strong preponderance of proof that the schooner had a proper and sufficient anchor light.

That it was the legal duty of the bark to avoid the schooner under the circumstances found to exist is, of course, conceded. Not having done so the bark was in fault, and must respond for the schooner's damages.

Having arrived at the above conclusion, it is unnecessary to consider the question of speed. But I deem it a duty, as a caution to navigators, to express the disapprobation of the Court of the almost reckless speed of the bark under the circumstances. Capt. Kendrick testified that the bark was quick to mind her helm, and it is preposterous to say that a speed of six miles an hour through the water was necessary for steerage way, when beyond all question one-half that speed, or even less, was amply sufficient for the purpose. Here was a large

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vessel, heavily laden, coming down the current and before a strong wind, in a comparatively narrow channel in which were numerous vessels at anchor, carrying canvas sufficient for the open water in such a breeze, and rushing along at a speed entirely unnecessary for her management, and which, under the circumstances, seemed entirely regardless of danger to herself or to other vessels. It was clearly her duty, on coming into the river, to have taken in her canvas until her speed had been slackened down to just what was absolutely necessary for steerage-way. The excessive speed of the bark was a gross fault, and one for which she must have been held responsible in any event.

Decree for libellant.

THE ROSCIUS.

FEBRUARY, 1873.

PRACTICE.—OPENING DEPOSITIONS OUT OF COURT.

Depositions opened out of Court and without the consent of the opposite party cannot be read in evidence.

Such consent to publication out of Court should be in writing.

MOTION on the part of claimant to open the decree, and for a new trial, on the ground that certain depositions on behalf of claimant, which arrived after the hearing and decree, showed a complete defense, and that the same were not received in time to be used on the hearing, on account of unavoidable delays.

The motion was opposed on behalf of libellants on the ground that the depositions were not entitled to be read in evidence, and that, therefore, a new trial would avail the

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claimant nothing. The following objections to the depositions were specified: 1. That the requisite notice of taking the depositions was not given. 2. That the depositions were opened out of Court. 3. That the certificate of the officer does not state that the depositions remained in his possession until they were sent to the clerk of the Court.

Messrs. *J. W. Finney* and *H. B. Brown*, for libellants, as to the question of notice, cited the Act of Congress of May 9, 1872, entitled "An Act to perpetuate testimony in the Courts of the United States," by which the rule as to notice prescribed by section 30 of the Act of 1789 (1 Stat. 88) was changed so as to require notice in all cases, and that the same be given by the party or his attorney, instead of the officer, as provided in certain cases by the last-named Act, and as was done in this case. And as to the opening of the depositions out of Court, they cited the provision of the said section 30 of the Act of 1789, requiring that depositions shall remain under the seal of the officer taking the same, "until opened in Court," and also the decision of the Supreme Court, in the case of *Beale v. Thompson* (8 Cranch, 70). And as to the sufficiency of the certificate, they cited 2 Parsons on Shipping and Admiralty, 445, note 3, and *Shanwiker v. Reading* (4 McLean, 240).

Mr. *W. A. Moore*, for respondent, contended that the notice, although signed by the officer, was actually served by the attorney, and that the same was therefore, in fact, given by the attorney, to all intents and purposes, within the meaning of the Act of 1872. And in reply to the objection that the depositions were opened out of Court, he produced an indorsement, signed by the clerk of this Court, upon the envelope, as follows: "Received from P. O., Detroit, this 18th day of February, 1873, and opened by consent and filed." And as to the alleged insufficiency of the certificate, he contended that there was nothing in the Act requiring that the certificate should state that the officer retained the depositions in his possession, etc., and that, until the con-

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trary is shown, the officer must be presumed to have done his duty in that regard.

LONGYEAR, J. Being of opinion that the second objection (that the depositions were opened out of Court) is well taken, it is unnecessary to consider the other two, and no opinion will be given as to them.

The requirement of the Act that depositions shall remain, etc., "until opened in Court," may, no doubt, be waived by a consent to their being opened out of Court. But, in my opinion, such consent should in all cases be evidenced by writing duly signed, and filed or indorsed upon the depositions—which does not appear to have been done in this case. On the contrary, it transpired at the hearing that no consent whatever, verbal or otherwise, was in fact given, so far as libellants were concerned, the indorsement by the clerk to that effect having been prematurely made, under the expectation or mistaken supposition that such consent would be, or had been given. This very case well illustrates the policy and necessity of the rule above suggested, that such consent should always be in writing, and on file, before depositions are allowed by the clerk to be opened out of Court.

The bare question, then, is presented as to the effect of the unauthorized opening of depositions out of Court, upon their admissibility in evidence.

This question, in view of the peremptory character of the statutory requirement, scarcely admits of discussion or doubt. Whether it does or not, however, is not an open question for this Court, the Supreme Court, in the case cited by libellants' counsel (*Beale v. Thompson*, 8 Cranch, 70), having decided, in a case almost exactly like the present, that depositions which have been thus opened are not admissible. That decision is decisive of the present case, and leaves nothing further to be said.

The depositions not being admissible in evidence, there is no ground for a new trial.

Motion denied.

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MARCH, 1873.

The 53d Rule in Admiralty, requiring the respondents in a cross-libel to give security to respond in damages as claimed in the cross-libel, applies as well to actions *in rem* as to those *in personam*.

MOTION to vacate an order requiring libellant to give security to answer the cross-libel, and for stay of proceedings.

Mr. *H. B. Brown*, for the motion, cited *The Bristol* (4 Ben. 55).

Mr. *W. A. Moore*, *contra*.

LONGYEAR, J. Rule 53, under which the question presented arises, reads as follows:

“Whenever a cross-libel is filed upon any counter-claim arising out of the same cause of action for which the original libel was filed, the respondents in the cross-libel shall give security, in the usual amount and form, to respond in damages as claimed in the said cross-libel, unless the Court, on cause shown, shall otherwise direct; and all proceedings upon the original libel shall be stayed until such security shall be given.”

Timothy Crowley, master of the scow *Snow Bird*, filed his libel *in rem* against the propeller *Toledo*, for collision. The propeller having been seized, the Union Steamboat Company, a corporation organized and existing under the laws of the State of New York, owner of the propeller, put in its claim and answer, admitting the collision as alleged, but denying that the propeller was in fault, and alleging that the collision was caused solely by the fault of the scow, and setting up a counter-claim for damages on account of the same collision, in

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the sum of \$700, for the recovery of which the respondent filed therewith its cross-libel against the scow, and prayed for a stay of proceedings upon the said original libel, until security should be given as required by the said Rule 53. No process has been issued upon the cross-libel, but an order was granted staying proceedings upon the original libel, conditionally, as prayed in the answer, and to vacate which this motion is now made.

The ground of the motion is that Rule 53 applies to libels and cross-libels *in personam* only, and not to those *in rem*.

The language of the rule used in describing the subject-matter to which it relates is certainly broad enough to cover both classes of cases; and, looking to that, and to the evil which the rule was evidently intended to remedy, it does not seem to me to admit of a doubt that such is the scope and effect of the rule. Before the rule, no security could be obtained, or proceedings had upon a cross-libel without the issuing and service of process. On this account, it often resulted that any remedy by cross-libel was impossible, on account of the libellant in the original libel, in an action *in personam*, or the vessel represented by the libellant in an action *in rem*, being and remaining beyond the same jurisdiction. This often resulted in the grossest injustice and oppression, equivalent in some cases to an absolute failure of justice. The respondent or claimant in the original suit in such cases, was obliged to follow the libellant, or the vessel, into other, and often foreign jurisdictions, involving ruinous outlays and delays. And often, when arrived where the libellant or the vessel was, he found there was no admiralty jurisdiction of the particular cause of action in question, on account of which he was deprived of the power to obtain security by a seizure of the vessel, and was obliged to resort to an action at common law, or forego any remedy whatever; and that, too, while his opponent had the full benefit of security by seizure under our admiralty jurisdiction. For instance: In the British American Provinces, the admiralty and maritime laws of England prevail. By those laws there is no admiralty jurisdiction beyond tide-water, and

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hence none upon the waters of the great lakes, and their connecting waters, and the St. Lawrence above tide-water—which are nearly equally divided between those Provinces and the United States, and constitute the boundary between the two countries to a vast extent, being not far from 1,500 miles in all. All the waters named being public navigable waters, and it being now well settled that the English rule as to tide-water, does not obtain in this country, and that the jurisdiction of the United States Admiralty Courts extends over all public navigable waters, our Courts have and entertain jurisdiction over the waters named. Now, in case of a collision between an American and a Canadian vessel on some of those waters (which is exactly the present case), the Canadian owner may libel the American vessel in our Courts (just what was done in this case), and obtain security for the damages he may recover by a seizure of the vessel—a privilege which is denied the American owner in the Canadian Courts, notwithstanding the collision may have been caused in part, or even wholly, by the fault of the Canadian vessel.

In my opinion it was to remedy this class of evils that Rule 53 was made. If I am correct in this, then it would deprive the Rule of its chiefest virtue to limit it to actions *in personam* alone. And I can see no good reason in the nature of the cases to which it relates for so limiting it in its application. The cases to which it relates are described in the rule as being those of cross-libels filed upon any *counter-claim* arising out of *the same cause of action* for which the original libel was filed. It must be, then, a cross-libel filed upon a claim arising out of a contract, tort, or other cause of action of which the Court already has jurisdiction by the original libel. In case of a counter-claim being set up, a cross-libel is necessary, not to give the Court jurisdiction of the subject-matter—it already has that—but in order to entitle the party setting up such claim to affirmative relief; such relief, when granted, however, must, from the nature of the case, be such and such only, as, in the language of the Rule, as well as upon those familiar general principles governing cross-actions, arises “out of the same cause of

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action for which the original libel was filed." A seizure is therefore not necessary to give the Court jurisdiction of such counter-claim, independently of Rule 53; and before that Rule a seizure was necessary only as a security for the enforcement of the remedy. The means of obtaining that security, without the necessity of process and a seizure, is provided for by the Rule, and I can see no good reason, constitutionally or otherwise, why it may not be done in that manner.

Neither can I see anything in the language of the Rule by which its application is necessarily limited to actions *in personam*. The Court was referred, upon the argument, to a recent decision in the District Court for the Southern District of New York (*The Bristol*, 4 Benedict, 55), holding that Rule 53 is limited to suits *in personam*, as is here contended. The learned judge in that case seems to lay considerable stress upon the use in the Rule of the expression, "respondents in the cross-libel," as implying a suit *in personam*. I can agree with him so far as to concede that a more fortunate expression might have been used to indicate what I conceive must be its meaning. Libellants in an original libel, whether *in personam* or *in rem*, must, of necessity, become "respondents in the cross-libel;" and I think that is all that is meant by the expression. And I think this meaning is further indicated by the provision of the Rule for a stay of proceedings; because it would be unjust to the libellant in the original libel that all proceedings upon the original libel should be stayed until such security shall be given, as the Rule provides, if he is not the person meant. An examination of others of the Admiralty Rules shows that the terms "respondent" and "defendant" are used indiscriminately, as having the same meaning, with a seeming disregard for exact technical nicety in the use of terms, and as equally applicable to suits *in rem* and *in personam*. At all events, I do not think there is sufficient in the use of that expression to do away with what is, to my mind, the evident object and purpose of the rule.

I entertain a high respect for the learning and ability of the judge who delivered the opinion above referred to, and have

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derived much aid in the past, as I expect to in the future, from his published opinions. It is very seldom I have occasion to differ with him, and when I do so it is with the greatest reluctance. In this case, for the reasons given, I am compelled to do so.

I hold, therefore, that Rule 53 applies to suits *in rem* as well as to suits *in personam*.

Motion denied.

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JULY, 1873.

COLLISION.—TUG AND TOW.—MANNING AND EQUIPMENT OF TUGS.

A tug, having a schooner in tow, ran aground upon the bank of Detroit river, and the schooner ran into her :

Held, that the tug was in fault, because the officer of the deck was also acting as wheelsman, and that the want of a proper lookout on the schooner did not contribute to the collision.

A steamtug, whose master also acts in the capacity of wheelsman, is insufficiently manned.

THIS was a libel for a collision between the schooner Victor and the tug Clara, which, at the time of the collision, was towing the schooner through the Detroit river, having taken her at Port Huron, under an agreement to tow her to Lake Erie. While passing Detroit, about midnight, the master of the tug made the green light of a propeller so near ahead that he decided to starboard his helm to pass her. After he had passed the propeller, he endeavored to port his wheel, and resume his course down the river, but, owing to the breakage of the links of her port wheel chain, the tug failed to obey her wheel, and, before she could be stopped, ran ashore upon the Canadian side of the river—the schooner coming on without changing her

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course, and striking the tug upon her starboard quarter, within a few feet of her stern. As soon as he discovered her failure to obey the wheel, and before the tug struck the bank, the master ran aft and hailed the schooner to port, and avoid striking him, but the hail was not heard upon the schooner. The tug, at the time of the collision, was under the charge of the master and wheelsman, nor was there any one upon the deck of the schooner except the wheelsman at the helm, and the mate, who was walking upon the cabin, aft. Neither vessel had a lookout.

Mr. *H. B. Brown*, for the libellants, argued that the collision was owing to the want of a lookout upon the schooner, and her consequent failure to hear the hail of the tug, and to port her wheel in time to prevent the collision.

If a vessel be shown to be in fault for want of a lookout, every doubt with regard to this having contributed to the collision must be resolved against the vessel so in fault (*The Ariadne*, 13 Wall. 475; *The Genesee Chief*, 12 How. 443, 463).

The tug was not in fault for running aground, if it was owing to the breakage of her machinery, and the Court finds she was provided with proper appliances for navigation—in other words, was seaworthy (1 Pars. Mar. Ins. 372–376).

Mr. *L. S. Trowbridge*, for the claimant, argued that the tug was insufficiently manned, her officers incompetent, her machinery defective, and that no proper signals of danger were given, and that the want of a proper lookout on the schooner did not contribute to the collision.

LONGYEAR, J. The principal fault urged against the schooner is that she had no lookout man on duty. Such appears to be the fact. Did this contribute to the collision? The tug and tow were proceeding down the river at a speed of eight miles an hour. The tow line was 52 fathoms in length in all. Making a reasonable allowance for portions taken up at each

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end, the length of the line between the two could not have exceeded 45 fathoms, or 270 feet.

The proof shows that it would take about half a minute to put the schooner's wheel over hard aport, and that it would take about as much longer for her to begin to swing, making one minute in all. During this period the schooner, at her then rate of speed, would pass over a space of a fraction over 700 feet, or a little over two and a half times the distance between her and the tug. So that even if the tug ran once and a half the distance between the two, or about 400 feet, after the hail was given warning the schooner to port her helm and keep clear, and before the tug grounded, it could have been of no avail if a lookout man had been on duty and had heard the hail and promptly reported the same. The proofs do not show how far the tug did run between the hail and the grounding, but I think it reasonably certain that she did not run more than 400 feet—probably less that. So that, conceding that the hail given was a proper one, and that it would have been heard and heeded on the schooner if she had had a lookout man on duty, it seems the collision would still have been inevitable, so far as the schooner was concerned.

But the hail or signal given was not the usual one in such cases, the usual signal being a blast or blasts from the tug's steam whistle, and the hail given being by the master shouting to the schooner. Besides being unusual, it was evidently much less effective than the usual signal, considering the distance and that the wind was blowing fresh against the direction of the sound. It was not heard on the schooner, and I think it reasonably certain from the proofs that it could not and would not have been heard by a lookout man if one had been on duty on her at the time.

But it is claimed that if there had been a lookout man on duty, the disabled condition of the tug would have been discovered on the schooner sooner than it was by the slacking of the line. But it does not appear that the line slackened perceptibly before the tug grounded, but, on the contrary, I think it reasonably certain from the proofs that such was not the case. It is

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true, the tug's engine was stopped when it was first discovered that she did not mind her helm, but was started again almost instantly, and at full speed. The headway of the tug could hardly have been checked at all. But when the tug grounded the vessels were only about 270 feet apart, as we have seen, a distance at which, as we have also seen, it was impossible for the schooner to have avoided the tug, at her then rate of speed. I think, therefore, that the want of a lookout man on the schooner did not contribute to the collision.

The master of the tug, then in charge of her navigation, was also acting as wheelsman. I think this was a fault, and one not without significance in this case. The responsible character of the occupation of tugs requires that there should be some competent person in charge of their navigation, separate and distinct from the wheelsman, and who has no other duties when the tug is in actual service. The master testifies, that after having starboarded to pass another vessel, and after having put his wheel aport as it was before, it was some ten minutes before he discovered that the tug was not minding her helm and was running in towards the shore; and as appears with reasonable certainty, she was already almost upon the channel bank when he did make the discovery. If his individual attention had been directed to the navigation of the tug, as it ought to have been, and he was competent for the position, he would certainly have made the discovery at once, and a collision would probably have been avoided.

Libel dismissed.

The Charlotte Raab.

THE CHARLOTTE RAAB.

JULY, 1873.

COLLISION.—VESSEL IN STAYS.—BURDEN OF PROOF.

If an injured vessel is shown to have been in stays at the time of the collision, the burden of proof is upon the colliding vessel to show that she was not in fault.

The master of a vessel approaching another while in stays, has no right to speculate upon the chances of her coming completely about, getting under headway and avoiding him.

THIS was a libel for a collision in the straits of Mackinac, between the schooner Charles Wall, of 691 tons, and the Charlotte Raab, a small three-masted schooner. The collision occurred about ten o'clock in the evening. The night was dark and somewhat cloudy, but not foggy, and the outlines of either vessel could be seen from the other at some distance. For an hour before the collision, both vessels had been sailing upon a course northeast by north, close-hauled upon the starboard tack, the Raab being about three points upon the weather quarter of the Wall, and about half a mile distant from her. The wind was due east, and the speed of both vessels was from 5 to 6 miles per hour.

While sailing in this manner, the watch of the Wall discovered ice, as they supposed, on their lee bow, and immediately put their ship in stays to come about upon the port tack. While coming about they exhibited a torch to the Raab, and as she came near, shouted to her to keep out of the way. She came on, however, without changing her course, and a collision ensued by which the jibboom and head gear of the Wall were carried away, as well as the foremast and mainmast of the Raab.

On the part of the Wall, it was alleged that the collision occurred while she was in stays, helpless and nearly motionless, while the cross-libel of the Raab charged that the Wall was

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under headway on the port tack, and that her duty to keep out of the way of the Raab, under the 12th Article, had become operative.

Mr. *H. B. Brown*, for the Charles Wall.

Mr. *W. A. Moore*, for the Charlotte Raab.

LONGYEAR, J. In the case of *The Sea Nymph* (Lush. 23), Dr. Lushington laid down the following rule: "A vessel proceeding in a cause of collision, and alleging herself to have been in stays at the time of the collision, and therefore helpless, is bound to prove in the first instance that such was the fact. The burden of proof then shifts, and the other side must then show that the collision was occasioned by the vessel proceeding being improperly put in stays, or was an inevitable accident."

It is undisputed that the Wall did go into stays and came about, and that the Raab did not avoid her. But it is contended: 1. That the Wall was improperly put in stays, and 2, that she had in fact filled away, and was actually under way on the port tack before the collision, and that it had therefore become her duty, under Article 12, to keep out of the way of the Raab.

First. There is no allegation of fault in the answer or cross-libel upon which to base the first-named defense. But even if there were, it is not sustained by the proofs. The course of the Wall, while on the starboard tack, was toward a shoal, and while it is clear that in the absence of any other cause for coming about, she had not run out her tack, it is rendered reasonably certain by the proofs that there was a field of ice in such proximity to that course, if continued, as to justify the master of the Wall in his apprehensions of danger, and in arriving at and acting upon his determination to come about when he did. Neither were the proximity and relative position of the Raab such as to render it improper for the Wall to come in stays, the Raab, by all the testimony, with a single

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exception, being at least half a mile behind, and from two to three points to the windward of the Wall, affording her ample space, time and means of avoiding the Wall, either by keeping away or coming about herself.

Second. That the Wall had some headway at the time of the collision I think is reasonably certain from the character of the injury inflicted upon the Raab. But whether it was the result of her sails having filled on the port tack, or whether of her not having entirely lost her headway in stays, is not so easy to determine, the proofs being somewhat complicated. But I do not consider it necessary to a decision to determine that point, because, even if it be true that her sails had taken the wind on the port tack before the collision (as to which, to say the least, there is very grave doubt), it was so short a time before, and the Wall had gained so little headway on that account, that it was impossible for her by that means to have avoided the Raab, on account of the nearness to which the latter had then approached, and therefore the Wall had not come within the operation of Article 12 when the collision occurred.

I regard it of no consequence whether the Wall did or did not exhibit a light just before or at the time of coming in stays, because it is clear to my mind, from the proofs on the part of the Raab, that the Wall's coming in stays was reported to the master of the Raab, and that the latter fully comprehended the situation in ample time to have avoided the Wall. The master of the Raab chose to take the risk of the Wall getting around on the port tack in time to keep out of his way. The result shows he was mistaken. It is not a sufficient answer to this that the Wall was longer in coming about than vessels of her size usually take, as attempted to be shown by the experts, because her slowness does not appear to have been the result of her not being in ordinary trim or of want of good seamanship on the part of those in charge of her navigation. On the contrary, it does appear that she was in ordinary trim, and that her slowness was the result rather of her not being ordinarily handy or quick in coming about, which we have

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high authority for holding cannot be attributed as a fault (*The Argo*, Swabey, 462; 1 Pars. Ship. and Adm. 575). In any view of the case, I am satisfied that the master of the Raab was not justified in taking the risk he did.

It results that, under the rule laid down by Dr. Lushington, in the *Sea Nymph*, just quoted, in which I full concur, the Raab must be held wholly in fault (see also *The Priscilla*, L. R. 3 Adm. & Eccl. 125; *The Nellie D.* 5 Blatch. 245; Lowndes on Collisions, 61).

Decree for the Charles Wall.

NOTE.—The case of the *Priscilla*, here cited, was affirmed by the Privy Council (1 Asp. Mar. Law Cas. 468, note; see also *The Palatine*, same page).

THE COLEMAN AND FOSTER.

SEPTEMBER, 1878.

COLLISION.—INSUFFICIENT EQUIPMENT.—RESPECTIVE LIABILITY OF TUG AND TOW.—PLEADING.

A tug, whose chief officer also acts as wheelsman, is insufficiently manned, and every doubt as to her being in fault will be resolved against her.

The fact that she is fully manned, according to the custom of tugs plying on those waters, is no excuse.

In case of uncertainty or irreconcilable conflict of testimony between a tug and her tow, as to their respective manœuvres, the fact that the tug is insufficiently manned will be regarded as a fault contributing to the collision.

Where the persons in charge of a tug and tow jointly participate in their control and management, the tug and tow are jointly liable for an injury done to a third vessel.

Objections to a libel for want of specific allegations of fault should be taken by exceptions, and if taken at the hearing, an amendment will be permitted.

An omission to state in the libel a material fact, peculiarly within the knowledge of the opposite party, as that one of the colliding vessels was improperly manned, will not be allowed to work an injury to the libellant, if the Court can see there was no design on his part in omitting to state it.

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THIS was a libel *in rem*, promoted by Michael B. Kean, owner of the schooner Ayr, for collision.

On the 11th day of May, 1872, the schooner Ayr lay aground and helpless on the easterly channel bank of the dredged channel at the mouth of the Saginaw river. On the same day, while the Ayr so lay aground, and in the day time, the tug Coleman came down the same channel, with the schooner Foster in a tow by a line or lines astern. Although the channel is narrow, yet there was sufficient room for the tug and tow to have passed the Ayr in safety. The Foster, however, when a little above where the Ayr lay, came near grounding on the opposite or westerly channel bank, and in the effort to keep her off, she was made to run into and collide with the Ayr, doing her considerable damage.

The contest was mainly between the tug and the tow as to which should pay the damages done to the Ayr, there being no serious dispute as to the right of the Ayr to recover against the one or the other.

On the part of the Foster it was insisted that she was without fault, and that the collision was caused wholly by the mismanagement and fault of the tug, and the following were insisted on :

1. That the threatened grounding of the Foster was caused by the tug towing her unnecessarily near the channel bank.

2. That in attempting to keep the Foster off the bank, the tug swung out into and across the channel further than was necessary, involving, as it did, the ultimate necessity of coming completely about and taking the Foster about with her, in attempting to do which the Foster was made inevitably to run into and collide with the Ayr as she did.

3. That the tug was not properly officered and manned.

On the contrary, it was insisted on the part of the tug that she was without fault, and that the collision was caused solely on account of the following faults on the part of the Foster :

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1. That her threatened grounding was caused by her sheer-
ing and not following in the wake of the tug.

2. That she was unseaworthy, in that her steering gear was
out of order.

3. That she did not follow the tug in the attempt of the
latter to keep off the channel bank.

Mr. *H. B. Brown*, for the libellant.

Mr. *W. A. Moore*, for the Foster.

Messrs. *F. H. Canfield* and *G. V. N. Lothrop*, for the tug
Coleman.

LONGYEAR, J. A large number of witnesses were ex-
amined, and a great amount of testimony taken on the part of
each, the tug and the tow; and I believe it is safe to assert
that, aside from the fact of the collision, there is but one other
fact material to the controversy, as to which the testimony is
not in the most direct and irreconcilable conflict. That one
fact is; as to the manner in which the tug was officered and
manned; and as that fact is, in my opinion, decisive of the
case, I shall not make the attempt to find where the truth lies
as to the other points in the case. I abandon such attempt all
the more willingly, because I am satisfied it could only end in
failure, or result at best in great doubt and uncertainty.

The persons in charge of both the Coleman and the Foster
knew the Ayr was aground, and were fully cognizant of the
difficulties to be encountered, and ought to, if they did not,
have fully comprehended the care and skill necessary, the one
to tow and the other to be towed, in safety to themselves and
the Ayr. The master of the tug remained on shore, and the
towing was undertaken with the mate in command. This
alone would not, however, necessarily constitute a fault. But
the tug was without a wheelsman, the mate attempting to dis-
charge that duty, beside that of master for the time being.

In the case of *The Victor*, recently decided, this Court

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held this to be a fault, and used the following language: "The responsible character of the occupation of tugs requires that there should be some competent person in charge of their navigation, separate and distinct from the wheelsman, and who has no other duties when the tug is in actual service."

I have seen no occasion since to doubt the correctness of that decision. On the contrary, since making it, my attention has been called to three decisions of this Court, namely, *The Zouave* (*ante*, p. 110); *The Armstrong* (*ante*, p. 130), and *The John Fretter*, holding the same doctrine—the first two by my predecessor, and the last one by Associate Justice Swayne. In the last-named case Judge Swayne made use of the following strong language, which I can adopt in its full force. He said: "It is impossible, in the nature of things, that the captain or mate can perform properly his other duties and also that of lookout, and they ought not to attempt it." The same is certainly true, with equal if not greater force, in regard to wheelsman. In the same case he further says, "that in such a case every doubt is to be resolved against the vessel committing such a fault."

As we have already remarked, the grossly conflicting and contradictory character of the testimony leaves it in great doubt and uncertainty as to what particular manoeuvres of the two vessels, or of either, and which one was the immediate cause of the collision, in consequence of the unseaworthy condition of the tug in respect to her equipment of officers and men at the time. The doubt must be resolved against her, unless the answers contended for on the argument are sufficient to defeat a recovery against her on that account. Before noticing their answers, however, I will consider the case on the part of the Foster.

In *Sturgis v. Boyer et al.* (24 How. 110, 121, 122), the Supreme Court made use of the following language, the case being in some of its aspects very much like the one now under consideration: "Cases arise, undoubtedly, when both the tow and the tug are jointly liable for the consequences of a collision; as when those in charge of the respective vessels

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jointly participate in their control and management, and the master or crew of both vessels are either deficient in skill, omit to take due care, or are guilty of negligence in their navigation. Other cases may well be imagined where the tow alone would be responsible; as when the tug is employed by the master or owners of the tow as the mere motive power to propel their vessel from one point to another, and both vessels are exclusively under the control, direction and management of the master and crew of the tow. * * * But whenever the tug, under the charge of her own master and crew, and in the usual and ordinary course of such an employment, undertakes to transport another vessel, which, for the time being, has neither her master nor crew on board, from one point to another, over waters where such accessory power is necessarily or usually employed, she must be held responsible for the proper navigation of both vessels. * * * Assuming that the tug is a suitable vessel, properly manned and equipped for the undertaking, so that no degree of negligence can attach to the owners of the tow, on the ground that the motive power employed by them was in an unseaworthy condition, and the tow, under the circumstances supposed, is no more responsible for the consequences of a collision than so much freight; and it is not perceived that it can make any difference in that behalf, that a part, or even the whole officers and crew of the tow are on board, provided it clearly appears that the tug was a seaworthy vessel, properly manned and equipped for the enterprise," etc.

To apply these doctrines to the present case:

In the first place, those in charge of the respective vessels jointly participated in their control and management, or, in other words, each vessel was in the immediate charge and control of her own officers and crew, and so, under the law as above laid down, this comes within the class of cases in which both the tow and the tug may be jointly liable. In the second place, the tug, as we have seen, was not properly manned for the enterprise, and so this case comes also within the class of cases in which the tow may be held in fault for employing a

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motive power which was in an unseaworthy condition. That the tow should be held in fault, especially in view of the great doubt and uncertainty before mentioned concerning her condition and her conduct, I think scarcely admits of doubt.

It results that both the tow and tug must be held jointly liable for the consequences of the collision, unless the answers to the above positions set up on the argument, which will now be considered, are sufficient to defeat a recovery.

The first objection to a recovery on the ground stated, viz: that the tug was not properly manned, is that there is no such specific fault charged or set up in the libel or other pleadings. It is true, the libel contains no specific allegations of fault against either vessel, the charge in that respect being in the most general terms imaginable, that the collision was caused "through the negligent and insufficient management of said tug, and schooner *Foster*." There are, however, two complete answers to the objection on this ground. Firstly, no exceptions having been taken to the libel, and the case having evidently been fully and fairly presented, so far as the matter in question is concerned, the Court would direct the libel to be amended, if necessary to sustain a decree in favor of libellant. Secondly, in the case of *The Syracuse* (12 Wall. 167, 173), the Supreme Court, in deciding an objection precisely like this one, and where it was expressly held that the libel was defective for want of such specific allegation, laid down the following rule: "But in admiralty, an omission to state some facts which prove to be material, but which cannot have occasioned any surprise to the opposite party, will not be allowed to work any injury to the libellant, if the Court can see there was no design on his part in omitting to state them (*The Quickstep*, 9 Wall. 670; *The Clement*, 2 Curtis, 366). There is no doctrine of mere technical variance in the admiralty, and subject to the rule above stated, it is the duty of the Court to extract the real case from the whole record, and decide accordingly." As in that case, so in this, it is very clear that the libellant had no design in view in omitting to charge specifically as a fault, that the tug was not properly manned; and it is equally clear

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that the proof on that subject, coming, as it did, from the opposite parties, could not have operated to confuse them.

The remaining objection to a recovery is that, as appears by the proofs, the tug was fully manned according to the custom in this respect of tugs plying on those waters. The rule requiring that tugs, while in active service, should have a wheelman separate from the officer in charge of her navigation, and that such officer have no other duties to perform, is a salutary one for the protection of life and property and inseparable from the very nature of the service, and no reckless and unsanctioned usage to the contrary can be allowed to do it away or modify it. If such a custom, as is contended, prevails at the mouth of Saginaw river, the sooner it is abandoned the better for the interests of commerce, as well as of tug owners themselves.

Decree for libellant.

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JANUARY, 1874.

PLEADINGS.—AMENDMENT.—JOINDER OF ACTIONS IN REM AND IN PERSONAM.

It is not competent to amend a joint libel against three vessels, by substituting the name of the owner of one vessel for the vessel, so as to change it from a libel *in rem* to one *in personam*.

A libel *in rem* cannot be changed into a libel *in personam* against the owner. A joint action for collision cannot be maintained *in rem* against one vessel, and *in personam* against the owner of another.

LIBEL for collision, by Frederick H. Blood, against the tug Young America, the schooner Home, and Francis R. P. Cottrell, owner of the scow Wilcox.

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Case came up on motion by the respondent Cottrell to dismiss the citation as to him, and to vacate the order allowing an amendment to the original libel upon which the citation was issued.

The original libel was filed against the tug, schooner and scow, *in rem*, for an alleged joint liability for damages on account of a collision. The tug and schooner were arrested and bonded. The scow was not arrested, on account of her being and remaining out of the jurisdiction, and no appearance was entered or bond given on her account.

In this state of the case, the libellant presented his petition, setting forth the foregoing facts, and alleging that the respondent Cottrell was owner of the scow at the time of the collision, and praying "that the said libel may be amended, and so far as concerns the said scow may be turned into a libel *in personam*, and that your said libellant may be permitted to proceed against the said Cottrell, as owner of said scow, instead of proceeding against the said scow herself, and that the said Cottrell may be cited," etc.

The Court at the time expressed serious doubts as to the regularity of such a proceeding, but finally, without a critical examination of the subject, made an order in accordance with the prayer of the petition. A citation having been issued and served on Cottrell, he now moves to dismiss the same, and to vacate the order amending the libel, and allowing the citation to issue.

Mr. *F. H. Canfield*, for the motion.

The amendment changes the form of action from one *in rem* to one *in personam*. The Court has no power to allow such an amendment (*The S. C. Ives*, 1 Newberry, 214; see, also, *The North Carolina*, 15 Pet. 40; *The John Jay*, 3 Blatch. 67; *The Richard Doane*, 2 Ben. 111).

The amendment is open to the further objection, that it works a complete change of parties, and is in fact the institution of a new suit.

At common law, the rule is well settled that the Court has no power to amend, by adding new parties, or by changing the form of action (*Winslow v. Merrill*, 11 Me. 127; *Atkinson v. Clapp*, 1 Wend. 73; *Winn v. Averill*, 24 Vt. 283; *Emerson v. Wilson*, 11 Vt. 357; *Bowman v. Stowell*, 21 Vt. 309; *State v. Cook*, 32 N. J. 347).

No case can be found sanctioning the practice attempted here, and the absence of authority is an argument against its adoption.

Mr. H. B. Brown, *contra*.

Any amendment is allowable in admiralty which does not change the cause of action.

Improper parties may be stricken out (*Newell v. Norton*, 3 Wall. 257, 263). New ones may be added (*The Commander in Chief*, 1 Wall. 49). A libel may be turned into an information (*U. S. v. Four Pieces Cloth*, 1 Paine, 435; see, also, Dunlap's Adm'ty Prac. 87, 129, 213; 2 Pars. on Ship. 429, 431). An amendment was refused in the *S. C. Ives* (Newb.), because an entire change in the nature and character of the action was proposed (See, also, 2 Conk. Adm. 258, 415; *The Harmony*, 1 Gall. 123; *Davis v. Leslie*, Abb. Adm. R. 123; *Nevitt v. Clarke*, Olcott, 316; *The Richard Doane*, 2 Ben. 111; *The City of Paris*, 1 Ben. 529; *The Henry Ewbank*, 1 Sum. 400).

It is settled that a Court of Admiralty is governed by the same rules of practice as a Court of Equity. In equity the name of a plaintiff may be changed (1 Dan. Chan'y Prac. 402, 404; *Jennings v. Springs*, 1 Bailey's Eq. 181).

The amendment is in furtherance of justice, as it is more equitable that the owner should pay, than an innocent purchaser of the vessel. We might discontinue against the Wilcox, and file an original libel against her owner, setting forth that his vessel was in fault, and the Court would order the causes to be tried together. What may be done indirectly may be done directly.

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LONGYEAR, J. The question presented involves two considerations:

1. As a libel against the scow alone, could the Court allow it to be changed by amendment from a libel *in rem* against the vessel to a libel *in personam* against the owner? 2. In case of a joint liability of two or more vessels for a collision, can a joint action be maintained *in rem* against one or more of the vessels, and *in personam* against the owners of the others?

First. Touching the first question, the counsel on either side have not referred the Court to any reported or unreported decision in point; and after a pretty thorough investigation I am satisfied that none exists. This would seem to indicate that the matter is so well understood at the bar that the question has never been raised, or if it has, that it has not been considered by the courts of sufficient importance to demand the promulgation of an opinion.

But upon which side of the question does this seeming acquiescence of court and bar bear? This question must be answered, if at all, by ascertaining what the courts have decided in cases involving principles lying at the foundation of the question under consideration.

In several instances in England and in this country the questions has arisen in collision cases, as to the right to ingraft upon or blend with an action *in rem* a proceeding *in personam* for the recovery of a deficiency against the owner, where the proceeds of the vessel were not sufficient to meet the damages pronounced for; and also whether an action *in rem* against the vessel, and an action *in personam* against the owner, could be joined in the same libel. In the United States, however, the latter question was settled by a rule of the Supreme Court in 1845 (Admiralty Rule 15). Since that time the decisions in this country have all turned upon the construction of the rule, and therefore throw but little light upon the question, and will not be noticed.

The first case in England which has come to the notice of the court was *The Triune*, in 1834 (3 Hagg. 114). In this case Sir J. Nicholl granted a monition to the owner, who had

intervened and bonded the vessel, to pay a deficiency, failing to do which he was imprisoned upon an attachment. When the motion was made, Sir J. Nicholl put this pertinent interrogatory to counsel: "Is there an instance of a warrant of arrest under circumstances such as are in this case, against the master and part owner?" The interrogatory does not appear to have been answered, but at a subsequent date he allowed the process to issue. The matter does not appear to have been discussed or very much considered, and altogether the report of the case is quite unsatisfactory.

The question next arose in England in 1840, in the case of *The Hope* (1 W. Rob. 155). In this case Dr. Lushington decided directly the contrary to Sir J. Nicholl in *The Triune*, and held that it was not competent for the court to ingraft upon a proceeding *in rem* a personal action against the owner to make good the excess of damage beyond the proceeds of the ship. His attention had not at that time been called to the decision of Sir J. Nicholl in *The Triune*. Subsequently, however, in the case of *The Volant*, in 1842 (1 W. Rob. 383), where the same question was again presented, his attention was called to Sir J. Nicholl's decision. Dr. Lushington then went over the subject quite fully, and finally disagreed entirely with Sir J. Nicholl, and fully adhered to his former opinion in the case of *The Hope*; and such appears to have been the settled doctrine in England ever since.

In *The Citizens' Bank v. The Nantucket Steamboat Company*, in 1841 (2 Story, 16, 57, 58), Judge Story held that in collision cases it was not competent to proceed in the same suit *in rem* against the vessel and *in personam* against the owner. And this appears to be the only reported case in which any question of this kind arose in the courts of the United States before the promulgation of Rule 15.

But we are not concerned here so much with the particular points decided in those cases as we are with the reasons upon which the decisions were founded. In the case of *The Hope* (1 W. Rob. 155) Dr. Lushington held substantially that, looking to the general principles upon which the proceedings in

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admiralty are conducted, it was wholly incompetent to ingraft a proceeding *in personam* against the owner upon a proceeding *in rem* against the vessel for the recovery of a deficiency.

Applying that declaration to the present question, it may be remarked that, if in view of those general principles, it is wholly incompetent for the recovery of a part of the damages only, that is, the excess of damages over value of vessel, for a still stronger reason it is incompetent to change the whole proceeding from one *in rem* to one *in personam*, in which the owner may be made liable for the whole damages without regard to the value of the vessel against which the libel was filed.

In the case of *The Volant* (1 W. Rob. 383), Dr. Lushington says: "The jurisdiction of this Court does not depend upon the existence of the ship, but upon the origin of the question to be decided, and the locality. Looking to a proceeding by the arrest of the vessel, it is clear that, if no appearance is given to the warrant arresting the ship, there can be no proceedings against the owners, for the Court cannot know who the owners are; the Court cannot exercise any power over persons not before the Court and never personally cited to appear." That is to say, in a proceeding *in rem*, for a collision, in which the owners are never personally cited to appear, there is no process or proceeding by which the Court can obtain jurisdiction of the owners, or know who they are, even in cases where the vessel has been arrested, other than by their voluntary appearance. This doctrine commends itself to my judgment, and, applied to the present case, it seems to me unanswerable.

How can it be said that, in a case like the present, where the vessel has not been arrested even, and there has been no appearance, the Court can change the proceeding *in rem* against the vessel to a proceeding *in personam* against the owner, of whom the Court has acquired and can acquire no jurisdiction, and whom the Court does not and cannot know, by virtue of any process or proceeding incident to the proceedings *in rem*? The allowance of the amendment making

the change, on the petition of the libellant, necessarily involved a determination by the Court of the fact as to who was the owner, thus giving judgment beforehand, in an *ex parte* proceeding, and in a proceeding *in rem*, as to an essential and traversable fact in actions *in personam* in like cases—a thing no Court ever does wittingly, and which, having done, through inadvertence or for want of due consideration, will be at once undone on attention being called to it.

In *The Citizens' Bank v. The Nantucket Steamboat Company* (2 Story, 58), Judge Story says: "In cases of collision the injured party may proceed *in rem*, or *in personam*, or successively in each way, until he has full satisfaction. But," he says, "I do not understand how the proceedings can be blended in the libel." And in another place, in the same opinion, he says: "In the course of the argument it was intimated that in libels of this sort the proceedings might be properly instituted both *in rem* against the steamboat, and *in personam* against the owners and master thereof. I ventured at the time to say that I knew of no principle or authority, in the general jurisprudence of Courts of Admiralty, which would justify such a joinder of proceedings, so very different in their nature and character and decretal effect. On the contrary, in this Court, every practice of this sort has been constantly discountenanced as irregular and improper."

It will be observed that the ground upon which the objection to joining the two proceedings in one libel was sustained by Judge Story was that the two are so very different in their nature and character and decretal effect. The same objection, as it seems to the Court, applies with increased force to changing the one proceeding into the other by way of amendment. And besides that, there is what seems to the Court the further unanswerable objection that such change involves an entire change of the party proceeded against. It is, in fact, the institution of a new suit by way of amendment, a proceeding never tolerated, I believe, in this or any Court.

Second. The foregoing considerations, I think, are equally conclusive against joining in one suit proceedings *in rem*

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against the two vessels and *in personam* against the owner of the other.

The original libel was brought against the three vessels, upon the theory, of course, that they were guilty of a joint tort. The action was joint as to the three. With the amendment, the action remains joint as to the two vessels which were arrested, but has necessarily become several as to the owner of the third, because, as an action *in personam*, it involves other and additional proof, and a different decree. The amendment has, therefore, wrought a palpable misjoinder of actions.

But in the view taken as to the first point, it is unnecessary to elaborate this one further for present purposes. It results that the amendment was irregular, and therefore that the order allowing the same must be vacated, the amended libel taken from the files, and the citation be dismissed, with costs of the motion against the libellant.

Motion granted.

THE WATCHFUL.

FEBRUARY, 1874.

GENERAL AVERAGE.—CONTRIBUTION FOR LOSS OF DECK LOAD.

Where by the bill of lading it is agreed that a portion of the cargo shall be carried on deck, the vessel must contribute for the loss of the deck load by jettison.

ON exceptions to the libel of the Frankfort Iron Company for general average.

October 23d, 1871, libellant shipped on board the schooner Watchful, at Frankfort, Michigan, 160 tons of iron ore for

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Detroit. By the bill of lading it was provided that twenty-five tons of the ore should be carried on the deck. The schooner proceeded on her voyage with twenty-five tons of ore stowed on deck accordingly, and when on Lake Huron, off Saginaw Bay, she encountered a storm, on account of which she was obliged to throw the deck load overboard for the safety of the vessel, and the same was wholly lost. The schooner arrived at Detroit in safety, and the balance of the ore was delivered to the consignee and the freight paid. There is no question but that the jettison was necessary, nor but that the loss of the ore, under the circumstances, would constitute a claim for general average, but for the fact that it was stowed on deck.

Mr. *John Atkinson*, for the exceptions.

The libel seeks to hold the vessel on two grounds:

First, that by the custom of her trade; and, second, by express agreement in the bill of lading, it was provided that the iron jettisoned should be carried on deck.

Where an agreement is express and unambiguous, custom cannot be shown. The object of usage is to interpret the language of contracts, in the absence of express stipulations, or when the meaning is equivocal and obscure (1 Greenl. Ev. § 292; 2 Bouvier's Law Dic. 615; *The Reeside*, 2 Sum. 567; see also, *Taylor v. Briggs*, 2 C. & P. 525; *Smith v. Wilson*, 3 B. & Ad. 728; *Hone v. Mut. Safety Ins. Co.* 1 Sand. [S. C.] 137; *Ware v. Hayward Rubber Co.* 3 Allen, 84; *Symonds v. Lloyd*, 6 C. B. [N. S.] 691; *Winn v. Chamberlain*, 32 Vt. 318; *Ray v. The Milwaukee Belle*, 3 Am. Law Times, 65; *Sayward v. Stevens*, 3 Gray, 103). If these cases are law, the libellant is remitted to its contract alone for relief.

Under the English law, until the case of *Gould v. Oliver* (4 Bing. N. C. 134) arose, it was a well recognized rule that no contribution could be had for goods carried on deck by the owner's consent (Lowndes on Gen. Av. 45; 1 Pars. Mar. Law, 185, 307). The case of *Lawrence v. Minturn* (17 How. 100) has no bearing upon the question in this case. *Smith v. Wright*

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(1 *Caines*, 43) is directly in point (see also *Dorsey v. Smith*, 4 La. 211; *Hampton v. Brig Thaddeus*, 4 Mart. La. 582; *Cram v. Aiken*, 13 Me. 229; *Sproat v. Donnell*, 26 Me. 185).

Ray v. The Milwaukee Belle (3 Am. Law Times R. 65), is decisive of the case at bar. In this case the contract was express, but no custom was proved.

The doctrine upon which these cases rest seems to be that where the shipper consents to have his goods laden on deck, it is, of course, at reduced freights, in return for which he runs the risk of having his goods jettisoned without compensation (3 Kent's Com. 240; *Lenox v. United Ins. Co.* 3 Johns. Cas. 178; *Dodge v. Bartol*, 5 Greenl. 286).

In the English cases, beside the custom to carry on deck, another custom was shown that such goods were carried at the risk of the owner, and upon this evidence the more recent cases seem to have turned (*Gould v. Oliver*, 2 M. & G. 208; Lowndes' Gen. Av. 42; *Miller v. Titherington*, 6 H. & N. 278; *Johnson v. Chapman*, 19 C. B. [N. S.] 563; *Cory v. Robinson*, *Miller v. Chapple*, cited in Lowndes, p. 42).

Mr. H. B. Brown, *contra*.

The jettison of a deck load has been held to give no claim to contribution solely because of the ancient rule of the maritime law that goods shall not be carried on deck (2 Pars. Mar. Ins. 218; Mar. Ord. of France, tit. 8, sec. 13).

Wherever, by contract or custom, goods are carried on deck, the vessel must contribute for their loss. *Cessante ratione cessat ipsa lex*. (2 Pars. Mar. Ins. 219, 221, 223, 224; *Gould v. Oliver*, 4 Bing. N. C. 134; *Brown v. Cornwell*, 1 Root, 60; *Toledo Ins. Co. v. Speares*, 16 Ind. 52; *Milward v. Hibbert*, 3 Q. B. 120; Dixon on Gen. Av. 32; Dixon on Ins. & Av. 87).

The decision in *Smith v. Wright* (1 *Caines*, 43) was placed upon the ground that there was a usage proven *against* the allowance of such average. If goods are stowed on deck without the consent of the shipper, and are lost, the vessel is liable

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for their full value (*The Waldo*, Daveis, 161; see 1 Pars. on Ship. 352).

It is conceded that where goods are carried on deck under a contract between the master and shipper, this would not render the innocent owners of goods stowed in the hold liable to contribute for their loss unless a custom to carry on deck was proved, of which the owners of goods in the hold might be presumed to be cognizant. Some of the cases apparently against have taken this distinction. In *Rogers v. Mechanics' Insurance Co.* (1 Story, 603), Judge Story held that blubber stowed on deck was not covered by insurance, but was to be contributed for. In the case of *Lawrence v. Minturn* (17 How. 100) the Supreme Court expressly disclaims any intention of passing upon the right of contribution (p. 115).

The case of *Johnson v. Chapman* (19 C. B. [N. S.] 563), is decisive of the point at issue (see, also, *The Delaware*, 14 Wall. 579, 598, 604; *Harris v. Moody*, 4 Bos. 210; s. c. 30 N. Y. 266).

The English and continental law is fully discussed in Lowndes on Gen. Av. 40-50, xxviii. Where by the custom of France small craft engaged in the coasting trade (*petit cabotage*) carry goods upon deck, they are contributed for in case of loss (Valin, Droit de la Marine, Lib. 2, tit. 1, art. 12; Caumont Dictionnaire de Droit Maritime, 405, 728).

LONGYEAR, J. It is an ancient and general rule that no portion of the cargo is allowed to be carried on deck, for the reason that it renders the ship more unmanageable in a storm, and involves a liability to be jettisoned, which would not exist if stowed under deck. By that rule, carrying cargo on deck is a fault on account of which, in case of loss by jettison, the vessel is liable, not for contribution or general average, but for the entire loss (1 Pars. Sh. and Adm. 352, and cases there cited). There are, however, exceptions to the rule, and it has been held not to apply, 1. Where, in a particular trade, or under certain circumstances, it is the custom to carry goods on deck. 2. When so carried by consent of the shipper. 3. In

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the case of steam vessels (1 Pars. Sh. & Adm. 352 to 359, and notes). In all these cases, it is said, the vessel is not liable for the entire loss, because the carrying of the goods on deck cannot be attributed as a fault, but if liable at all, it is for contribution, or general average merely.

As to liability to contribution under the case first stated—that of carrying goods on deck according to usage—there has been much controversy in the Courts and considerable contrariety of decision. I shall, however, pass this by for the present, for the reason that the case falls clearly within the second case stated, the ore having been carried on deck by the express consent and agreement of the master of the schooner and the libellant. As *The Watchful* was a sailing vessel, we have nothing to do with the third case stated.

Being carried on deck was undoubtedly the cause of the necessity for the jettison; at least such is the presumption; and being so carried was no less a fault because by consent, as to all persons interested not parties or privies to the agreement. The vessel, and her owner and master, must however be held to be bound by the agreement, and as between them and the shipper the fault must be held to have been waived. As to them, therefore, the fact of the ore being carried on deck instead of under deck, must be held to be out of the question. Any other rule would make the shipper run the entire risk in a matter in regard to which the benefits are mutual, which would be unjust. The shipper, by his consent, waives all claim to entire compensation in case of the jettison of the goods. The master, by taking the goods on board as freight, assumes for the vessel all the ordinary relations between ship and cargo, among which is the liability to contribution in case of loss by jettison. The only variation from the general rule wrought by the agreement of the shipper, that the goods may be carried on deck, is that, in case of loss by jettison, the vessel shall not be liable for the entire loss, a variation wholly in favor of the owners.

Mr. Parsons, in his work on Shipping and Admiralty, vol. 1, p. 357, says: "The owner of the ship of course knew that

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the goods were carried on deck, for we should say, on this point, that the knowledge of his master was his knowledge" (citing *The Paragon* Ware, 335, and *The Rebecca*, Ware, 194); "and," he adds, "if it was not right to carry them there, the ship was as much in fault as the shipper, and we know not why the ship should not contribute for their loss, if saved by their jettison." And Mr. Lowndes, in his work on General Average, p. 43, in laying down and remarking upon the rule as established in England in the leading case of *Gould v. Oliver* (4 Bing. N. C. 134, and 2 Mann. & G. 208), says: "Whenever, as very generally was the case, a provision for the carrying of a deck load is inserted in the charter party, the jettison of such deck load is replaced by a contribution between the shipowner and the owner of the deck load. This contribution is adjusted precisely in the same manner as a general average would be, but is called by a different name. It is called a 'general contribution.' Payment of 'general contribution' is enforced from no one who has not by express contract made himself a party to the stowage on deck. * * * The principle of these adjustments is that, as between assenting parties to such stowage, the deck must be taken to be a proper place for carrying cargo, and what is thrown from thence is to be treated as if it had been below deck; but as regards all parties who have not assented, the old rule remains in force, and for them there is no general average for deck-load jettison."

These views are peculiarly applicable to the present case, and they have my full concurrence. In *Lawrence v. Minturn* (17 How. 100), the Supreme Court (p. 114) cite approvingly the following from the opinion of the Court in *Gould v. Oliver, supra*: "Now, when the loading on deck has taken place with the consent of the merchant, it is obvious that no remedy against the shipowner or master, for a wrongful loading of the goods on deck, can exist. The foreign authorities are, indeed, express on that point; and the general rule of the English law, that no one can maintain an action for a wrong, where he has consented or contributed to the act which occasions the loss, leads to the same conclusion." But at page 115

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the Court say: "His right to contribution is not involved in this case;" thus recognizing a distinction between the shipper's right to compensation for the entire loss, and his right to contribution in case of jettison of goods carried on deck by his consent, and that the determination of the former does not necessarily determine the latter under the same state of facts. And well may it be so, for, as before remarked, while it would be clearly unjust that the ship should bear the entire loss, where it occurs by the mutual fault of shipper and master, it would be equally unjust that the shipper should bear the entire loss under the same circumstances, the risk having been for the mutual benefit of both. In the one case no recovery can be had, because it must be based upon a mutual wrong. In the other it can be had because it is based upon a mutual risk for a mutual benefit. In the former the action is for a tort, and in its nature *ex delicto*. In the latter it is based upon the contract of affreightment, and is in its nature *ex contractu* (*DuPont de Nemours v. Vane*, 19 How. 168; Lowndes on Gen. Av. 43, 44; 2 Pars. Mar. Ins. 218, 224).

In the case of *The Milwaukee Belle* (3 Am. L. T. Rep. 65), the facts of which were very much like those of the present case, decided in the District Court for Wisconsin, in 1870, the learned judge seemed to have lost sight of the foregoing distinctions, and he dismissed the libel on the authority of *Lawrence v. Minturn* (*supra*), giving for his principal reason, that the libellants, by knowingly shipping the goods on deck, had thereby consented "that the vessel might thereby be rendered less manageable, and more liable to labor in a storm." But the master was equally consenting, and, the sacrifice being for the salvation of the vessel, why should not that which was thus saved contribute to make up the loss thus made necessary by mutual consent?

Counsel on both sides in this case exhibited a commendable zeal in the preparation and argument of the question involved, and referred the Court to and remarked upon a large number of authorities, ancient and modern, and in which nearly every phase of the general question of a shipper's right to general

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average, or contribution for loss by jettison of deck-load cargo, is discussed. The Court has derived much aid from their able and enlightened presentation of the question. It is to be observed, however, that most of the authorities cited bear upon the right as based upon custom or locality, or both, and but very few of them upon the right as based upon express agreement, as in the present case. It would nevertheless have been a pleasure to trace those authorities down to the present time, and note how the Courts have become gradually more and more liberal in their views, and disposed to decide each case upon its own peculiar merits, rather than by any rigid, unbending rule. But it would have been extending this opinion to an unwarrantable length, and was unnecessary to a decision of the present case.

Exceptions overruled.

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FEBRUARY, 1874.

WAGES.—STALE CLAIM.—PLEADING.—INFANCY.—COSTS.

The defense of stale claim must be set up in the answer, and will not avail where the owner has retained a portion of the purchase money in his hands, and the suit is defended in the interest of the vendor.

A minor may recover for his wages where the contract was made personally with him, and it does not appear that he has any parent, guardian, or master entitled to receive his earnings.

Quære—Whether the defense of infancy can be made available otherwise than by a plea to the competency of libellant to sue in his own name?

Costs were awarded where the suit was defended in the interest of a former owner, though no demand had been made of the claimants.

LIBEL for wages.

The libel was filed October 6, 1873, and is based upon a due bill for \$44 75, for services as seaman in the season of

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1871, bearing date June 3d of that year. The answer ignores the facts alleged as to the services rendered, and the giving of the due bill, and alleges the purchase of the scow in 1873 by the claimants; that the scow was within the jurisdiction of the Court during the whole time between the giving of the due bill and the claimant's purchase, and therefore, as to them, libellant's claim has become stale, and is no longer a lien upon the vessel. No other defense is set up in the answer.

Mr. *Jno. C. Donelly*, for libellant.

Mr. *L. S. Trowbridge*, for claimants.

LONGYEAR, J. In order to maintain the defense of stale claim it is necessary to allege and prove that the respondents are purchasers in good faith, for a valuable consideration, and without notice of the existence of the claim. The answer contains none of these allegations. The defense set up might, therefore, be overruled without further remark. But as proofs were taken as though the defense had been sufficiently alleged, the case will be considered briefly in view of what was proven.

The proofs show that the claimants bought the vessel of one Brown, April 8, 1873, for \$1,425, of which \$600 was paid in cash, and the balance was secured by a mortgage on the vessel, to be paid in two years from that date, Brown to pay all claims then existing against the vessel; and that the claimants are defending this suit for and in the interest of Brown. There is no pretense that the claim of libellant was not good against the vessel in Brown's hands at the time of the sale by him to respondents; and, the suit being defended in fact by Brown, and the respondents having full protection by means of the balance of purchase money still unpaid, against any decree which may be made against the vessel, the defense set up is wholly untenable under the proofs.

The proofs were all taken by deposition, and certain objec-

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tions taken by respondents before the commissioner were insisted upon at the argument. The above facts, however, are all arrived at without resort to the testimony objected to, and for that reason the objections are not noticed.

Libellant was examined as a witness, and on his cross-examination it came out that when this suit was commenced he was, and that he still is a minor; that he was twenty years of age on the 18th day of November, 1873. He further testified that his father had been dead ten or twelve years, but that his mother was still living.

On this proof it was contended, upon the argument, that the libel must be dismissed, for the reasons: 1. That libellant's mother was entitled to his earnings, and was the only person who could sue therefor; or, 2, that if libellant could bring the suit, he could do so only by next friend.

I think the objection comes too late. No such defense is set up in the answer; and I think it exceedingly doubtful, even if a legal defense, whether it could be made available otherwise than by a plea to the competency of the libellant to sue in his own name (*Wicks v. Ellis*, Abb. Adm. R. 444).

Even if a proper foundation had been laid, however, I do not think the defense would have been good in this case. The contract was made with libellant in person, payments were made to him, and the due bill for balance due him upon which this suit is founded, was given to him, and a payment made to him upon it, and the matter had lain upward of two years before the libel in this case was filed, and the mother nowhere appears as setting up any claim. Under these circumstances, I think she would be estopped from setting up a claim after the recovery against the vessel by libellant.

There is no rule in the Admiralty Courts requiring minors to sue by next friend. Their right to sue in the admiralty for wages has been fully recognized (*Wicks v. Ellis*, Abb. Adm. R. 444; *The David Faust*, 1 Ben. 183; *The Etna*, Ware, 476). The general rule seems to be this: That a minor may recover in the admiralty for wages, where the contract was made personally with him, and it does not appear that he has any parent, guardian, or master entitled to receive his earn-

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ings (2 Pars. Adm. 372, and note 3; *Wicks v. Ellis* and *The David Faust, supra*). And, in *Wicks v. Ellis*, on a motion by respondent to be discharged from arrest on the ground, among others, that the libellant was a minor, and no next friend had been appointed, &c., Judge Betts held that it could not be demanded as a matter of right, that a minor, suing in the admiralty for wages, should sue by next friend; and, also, that if his so doing in his own name, without the appointment of a next friend, was a legal defense in any case, the respondent must be put to his plea to the competency of the libellant.

Minors suing in admiralty for wages become peculiarly the wards of the Court, and the Court will go to the utmost limit consistent with the interests and rights of respondents in protecting and enforcing their rights (*The Etna, Ware, 476*). In this case, the rights of the respondents can be in no manner jeopardized by a decree in favor of libellant, on account of any danger of having to pay the claim to the mother of the libellant, because, as has been already remarked, she must be held, in any suit she might bring for that purpose, by having permitted libellant to contract in his own name, to receive wages, and delayed so long to set up any claim on account of the balance here sued for, to have abandoned all claim thereto in her own right.

There is no dispute^d that the amount due libellant is the amount of the due bill, and interest from its date, less \$10 paid June 8, 1872:

Due bill dated June 3, 1873.....	\$44 75
Interest to June 8, 1872—1 year 5 days.....	3 17
	<hr/>
	\$47 92
Paid June 8, 1872.....	10 00
	<hr/>
	\$37 92
Interest from June 8, 1872, to date, February 23, 1874.....	4 25
	<hr/>
Balance due libellant.....	\$42 17

And for which he must have a decree.

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It was claimed, on the argument, that costs ought not to be awarded against respondents, because no demand had been made of them before the libel was filed. But, as we have seen, the respondents are fully protected, and the suit is defended in the interest of the former owner, Brown. So far as the question of costs is concerned, the case must be treated as though Brown was the responsible party respondent, and as against him the Court has no hesitation in awarding costs.

Decree for libellant.

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MARCH, 1874.

DAMAGES PROXIMATE AND REMOTE.—LOSS OF INSURANCE.

The master of a barge, having an order for a cargo of coal, was directed by the shipper to go to an upper dock, take on 300 tons, and then to return to the shipper's own dock and receive the residue of the cargo. Having taken on the 300 tons at the upper dock, he immediately put to sea, without calling for the residue as agreed, without signing bills of lading, or reporting his departure, and the barge and cargo were lost by a peril of the sea. An understanding between the consignee and shipper was shown, that the shipper should insure all cargoes shipped upon vessels of that class for the benefit of the consignee. *Held*, that the owner of the barge was not liable for the loss of such insurance by reason of the neglect of the master to report his departure, he having no knowledge of the understanding between the shipper and consignee.

The failure to report in such case cannot be deemed the proximate cause of the loss of the insurance.

ACTION in personam by Chas. E. Letts *et al.* against Robert J. Hackett.

The libel was based upon a contract of affreightment of a cargo or cargoes of coal to be transported in respondent's ves-

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sels from Cleveland to Detroit in November, 1872. A part of one cargo, 295 tons, was taken on board respondent's barge Ontario, and the weather being threatening and the closing of navigation imminent, the barge put to sea, and together with the cargo, was lost. The loss was clearly by a peril of the sea, and no damages are claimed on that account. The cargo was not insured, however, and it was claimed on the part of libellants that the failure to insure was owing to the neglect and misconduct of the master of the barge, and it was to recover damages on this account the suit was brought.

Libellants were coal dealers in Detroit, and as such purchased coal in large quantities of the Pennsylvania Coal Company, in Cleveland; and they had a standing arrangement with the agent of the company there to insure for libellants all cargoes of coal shipped to them in vessels of a certain class, and to which class the barge Ontario belonged.

On application of the master of the barge to the agent of the coal company for a cargo for libellants, he was sent up the river to take on a part of a cargo at the "Mahoning chutes," so called, and was then to return to the company's docks near the mouth of the river, and complete his lading, which was to be 400 tons. After taking on about 295 tons at the Mahoning chutes, the barge came down for the purpose of completing her load, but could not lie at the company's dock for that purpose on account of the weather, and so laid up to a dock further up the river to await the abating of the storm. During the following night, the storm having abated, the master of the barge was notified by the tug Torrent, upon which he depended to make the voyage, that if he went with her he must get ready and put to sea at once. Close of navigation by the setting in of winter being imminent, the master of the barge decided to go with the Torrent, that being, as he believed, his only chance to reach Detroit (his home port) that season, and he did so next morning. The barge so left without completing her load, without a bill of lading, and without notifying the agent of the company; and the agent testified that he had

no knowledge of her having left until he heard of the catastrophe by which she was lost ; and no insurance was effected.

The question was, is the respondent liable for the loss on account of the failure to insure ?

Mr. *H. B. Brown*, for libellants.

Without reference to his contract to call and take on the residue of the cargo, the master has no right to slip away from a port without giving the shipper notice of his departure (2 Pars. on Ship. p. 3). If he fails to give such notice, he is liable for any damage naturally resulting therefrom. If the shipper has thereby lost an opportunity to insure, *i. e.*, has lost his insurance, the ship is responsible (*Hutchings v. Ladd*, 16 Mich. 493 ; *Russell v. Livingston*, 16 N. Y. 515 ; *Hadley v. Baxendale*, 9 Exch. 341). It is enough to show that the custom to insure is so general that the master must be presumed to know that the cargo *might be insured* and also to show that it was the custom of the shippers in this case to insure. The evidence upon this point is full and conclusive.

Mr. *W. A. Moore*, for respondent.

The only question is whether the failure to obtain the bill of lading by the master before leaving Cleveland, so that the consignor would have knowledge that the barge was to leave, and therefore insure the coal, is such negligence on the part of Hackett as will make him liable for the loss of the coal.

The agent of the coal company admits they did not get the invoice of the coal until after he heard of the loss of the barge. He admits he did not know the class of the barge, that he neither asked the captain nor consulted his register.

Libellants make no charge of violation of duty on the part of respondent, which caused the loss of the coal.

LONGYEAR, J. The alleged faults upon which this action is based are all summed up in the failure of the master

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of the barge to notify the agent of his leaving, so that he could at once have effected an insurance on the cargo, as it is claimed it was his duty to do. It was said it was the duty of the master to complete his lading. This is important only because, in that case, the agent would probably have known of his leaving, and the amount of cargo to be insured. It was also said that it was the duty of the master to sign a bill of lading before leaving; but this was important only for the same reason as the other. Let it be conceded, therefore, that the duties of the master of the barge were as claimed; that he failed to discharge those duties without legal excuse; and that the failure to obtain insurance on the cargo was wholly owing to such failure on the part of the master (as to which latter proposition, however, I think there is doubt); and the important question which meets us at the threshold is, are the damages sustained by libellants legally chargeable to respondent under the allegations and proofs in the case?

Whatever difficulty there may be, and it is often great, in determining what damages arising out of breach of contract are sufficiently direct and immediate, and what are too remote to be allowed against a party so in default, the rule of law is well settled that the damages must, in all cases, be such as must have been in the contemplation of the parties when the contract was entered into (Sedg. on Dam. 63 to 76; 2 Greenl. Ev. § 256, and note 6; *Fox v. Harding*, 7 Cush. 516; *Hadley v. Baxendale*, 9 Exch. 341, 354; *Hutchings v. Ladd*, 16 Mich. 493, 505).

The arrangement between libellants and the agent of the coal company, in regard to insurance, was entirely separate from and independent of the contract of affreightment; and there is no allegation, and no testimony even tending to prove that respondent was informed or knew of its existence when the contract was made, or afterward. Under these circumstances, it cannot be said that damages arising out of a failure to insure could have been in the contemplation of the respondent when he entered into the contract of affreightment. Under

the foregoing rule of law, therefore, respondent cannot be held liable for the damages complained of.

But even if the facts were such as to bring the libellants' case within the rule of law above stated as to damages, I think the libellants could not recover, because it is by no means certain that the insurance would have been effected if the barge had waited to complete her lading, or the agent had been notified of her leaving when she did leave. In order to insure, it was necessary, of course, that the agent should ascertain the number of tons on board. The master of the barge testifies that when he had taken on what he did take on at the Mahoning chutes, he requested of the weigher a statement of the number of tons, and was informed by the weigher that he could not give it to him there, but it would be sent down to the coal company's office. This was not done until the next day, or next but one, after the barge had left, and after the catastrophe had happened, when, of course, it was too late to insure. It is true, if the barge had waited to complete her lading, the information might have been received before she left; but the Court would hardly hold a party liable upon a mere probability of that sort, especially in view of the apparent urgency of the necessity of the barge leaving when she did, and without completing her lading. But it is not necessary to put the decision upon this point. The first point is clearly sufficient to dispose of the case adversely to the libellants.

Libel dismissed.

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MARCH, 1874.

PRACTICE.—AMENDMENT OF CLAIM.

A motion to strike the claim and answer from the files, on the ground that it appeared on the hearing that the claimant had no interest in the property at the time the answer was filed, will not be entertained.

If the claim is not put in issue, and libellant goes to a hearing upon the merits without objection, it is a waiver of such preliminary inquiry, and an admission that the claimant is rightly in Court.

A party will not be permitted to amend his claim by setting forth that at the time the cause of action arose, he *was* the true and *bona fide* owner of the vessel, and had agreed with the present owner to discharge all liens against her.

The right of a party to appear and defend a suit *in rem* must be put in contestation, if at all, before the hearing, and then only by way of exception if the disability appear upon the face of the claim, or an exceptive allegation putting the right in issue if it does not so appear.

MOTION of libellants to strike the claim and answer of Andrew B. Crawford and Jacob Crawford from the files, and the counter motion of the respondents to amend their claim.

The tug was libelled and arrested at the suit of Mary Jane Peach, for repairs, in the sum of \$1,275 35, and thereupon was bonded by and delivered to one George E. Brockway, as claimant. Subsequently Andrew B. and Jacob Crawford put in their claim and answer on oath, by the first article of which it was alleged "that these respondents are the true and *bona fide* owners of said tug, and no one else is the owner thereof." The case was then brought on for hearing, and witnesses were sworn and examined on both sides touching the merits of the controversy. It came out in evidence on the hearing, that, although the Crawfords were the owners of the tug when the repairs were made, they had subsequently, and before the filing of the libel in this suit, sold and transferred the tug to George E. Brockway, so that the Crawfords, at the time of

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filing the libel and of putting in their claim and answer, had no right or title to, or claim or interest in or lien upon the said tug. It further appeared, however, that in the sale and transfer to Brockway, the Crawfords had agreed and bound themselves to pay off and discharge all claims against and liens upon the tug then existing.

After the proofs were all in and the evidence closed, counsel for libellant moved to strike the claim and answer of the said Crawfords from the files, for the reason that having no title to or interest in the tug, they had no standing in court and no right to defend; and for a decree *pro confesso*; and the counsel for the Crawfords moved for leave to amend their claim, so as to set up their relations to the tug and the subject-matter of this suit substantially as above recited.

Both motions were heard together, and are now for decision.

Mr. *H. B. Brown*, for libellant, cited in support of his motion Admiralty Rules, 25, 34; 2 Conk. Ad. Pr. 203, 205; Ben. Ad. Pr. secs. 461, 463; Williams & Bruce's Ad. Prac. 199, 200; *The Packet* (3 Mason, 255, 257); *The Boston* (1 Sum. 328); *The Idaho* (4 Ben. 272); *The Killarney* (Lush. 427, 435); *The Cargo ex Galam* (Browning & Lush. 167).

Mr. *W. A. Moore*, for respondents, cited *The Mary Ann* (Ware, 104).

LONGYEAR, J. Libellant's motion to strike the claim and answer from the files comes too late; and even if it had been made in time, it seems it would not be the proper mode of raising the question. The right of a party to appear and defend a suit *in rem* in admiralty must be put in contestation, if at all, before a hearing or other proceeding founded upon the claim and answer, and then only by way of exception if the disability appear upon the face of the claim, or an exceptive allegation putting the right in issue if it does not so appear. Such issue would then be formally heard and decided before a hearing upon the merits. If the claim is not thus put in issue, and the libellant goes to a hearing upon the merits

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without objection, it is a waiver of such preliminary inquiry, and an admission that the party is rightly in Court and capable of contesting the merits.

This identical question came before the Supreme Court as early as in 1828, in the case of *The United States v. 422 Casks of Wine* (1 Pet. 547, 549), and was then decided. I quote from the language of Story, J., in delivering the opinion of the Court, not only to reproduce the argument upon which the decision was based, but because of the bearing that argument has upon the respondent's motion to amend. Justice Story there said: "This objection is founded upon a mistaken view of the time, nature and order of the proceedings proper in suits *in rem*, whether arising on the admiralty or the exchequer side of the Court. In such suits the claimant is an actor, and is entitled to come before the Court in that character, only by virtue of his proprietary interest in the thing in controversy. This alone gives him a *persona standi in judicio*. It is necessary that he should establish his right to that character as a preliminary to his admission as a party *ad litem* capable of sustaining the litigation. He is therefore, in the regular and proper course of practice, required in the first instance to put in his claim upon oath, averring in positive terms his proprietary interest. If he refuses so to do, it is a sufficient reason for the rejection of his claim. * * * If this is not done, it furnishes matter of exception, and may be insisted upon by the adverse party for the dismissal of the claim. If the claim be admitted upon this preliminary proof, it is still open to contestation, and by a suitable exceptive allegation in the admiralty, or by a correspondent plea in the nature of a plea in abatement to the person of the claimant, in the exchequer, the facts of proprietary interest sufficient to support the claim may be put in contestation and formally decided. It is in this stage of the proceedings, and in this only, that the question of the claimant's right is generally open for discussion. If the claim is admitted without objection, and allegations or pleadings to the merits are subsequently put in, it is a waiver of the preliminary inquiry, and an admission that the party is rightly in Court and capable of contesting the merits."

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No harm would necessarily result to the true owner, where the claimant is not in reality such, in case the merits are finally disposed of in favor of the claimant, because, as was also decided in the case just cited, the Court may, if the claimant's want of title appears upon the trial, in its discretion retain the property in its own custody until the true owner may have an opportunity to interpose a claim and receive it from the Court. No such question, however, can arise in the present case, because the property has already been delivered to the true owner.

It results that the motion to strike the claim and answer from the files must be denied.

Respondents' motion for leave to amend their claim will now be considered.

If the amendment should be allowed, the libellant must, at the same time, be remitted to the same right of exception she would have had if the claim had been originally put in as amended. This would present a new issue, and one of a preliminary and dilatory character, and that after a hearing has been had upon the merits. This the Court will never allow, except, perhaps, upon some urgent necessity, which, however, is not now apparent to the Court, and certainly does not exist in this case.

What the effect of the amendment, if allowed, would have upon the standing in Court of the respondents it is not necessary now to consider; but that such effect would be to deprive them of any standing in Court, and to dismiss them and their defense from the case is beyond all question, upon principle as well as upon the uniform current of authority, English and American, without, I believe, a single dissenting opinion. Those who have an interest in examining the question will find it fully discussed and elucidated in the cases and authorities cited by counsel, *supra*.

It results that the respondents' motion to amend must be also denied; and the case must proceed to a decree upon the issue as it now stands and the hearing already had.

Motions denied.

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THE ATALANTA.

MARCH, 1874.

STALE CLAIM.—PURCHASER BOUND TO USE DUE DILIGENCE.

Where the buyer of a vessel, who had given non-negotiable notes for the purchase money, advanced \$2,000 on account of certain claims against her, taking up his notes to this amount, and neglected to ascertain the nature and full amount of the claims, which information was easily accessible, it was *Held* that, in suits for the residue of the claims, he did not stand in the position of a *bona fide* purchaser without notice, though he had paid for the vessel in full.

The purchaser of a vessel is bound to the exercise of reasonable diligence to ascertain the nature and amount of liens against her.

Notice to a purchaser, while a sufficient amount of purchase money remains unpaid to meet the liens, is as effectual to keep the liens alive as it would be if he had such notice at the time of such purchase.

LIBELS for supplies, towage services, and repairs.

The only defense was, that the claimant was a subsequent purchaser for a valuable consideration, in good faith and without notice of liens, and that the liens had become stale and extinguished as against the vessel in claimant's hands, by failure of the libellants to prosecute within a reasonable time.

In October, 1870, the Atalanta was disabled in a storm on Lake Huron, and the claims in this case were for towage, supplies and repairs rendered in consequence thereof and at that time. The vessel was then owned in Chicago, and belonged to the estate of her former owner, then deceased. One Wm. H. Rogers was administrator of said estate. Immediately after the repairs, the vessel returned to her home port, Chicago. During the season of 1871 she made one trip to Buffalo, but with that exception, she was not again in the waters of this district until she was seized upon, by process from this Court, in May, 1872. Libellants had no knowledge of her trip to Buffalo at the time, although they were on the watch for her.

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The claimant Whitbeck purchased the vessel of the administrator Roberts, in February, 1871, for \$10,575, her full value, of which he paid half cash, and for the other half gave five promissory notes, payable in six months from date. For the purpose of protecting Whitbeck against liens, these notes were made non-negotiable, and each one had indorsed upon it a statement that it should not be collectable so long as there were any unpaid liens upon the vessel. These claims were duly filed and proved in the Probate Court at Chicago. Soon thereafter an arrangement was made by which one Connors, who had a power of attorney from libellants to collect these claims, and the administrator Rogers called upon Whitbeck for the purpose of obtaining payment of the claims, and he did take up two of the \$1,000 non-negotiable notes, and gave negotiable notes instead, which were discounted and the proceeds remitted to libellants, who credited the same upon their claims, but they were not sufficient to pay them in full. Two other of the non-negotiable notes were paid to Rogers at the date of their maturity, but the third, for \$1,285 50, remains still unpaid. During the winter of 1871-2, the vessel was seized at Chicago upon a chattel mortgage, and to redeem the same Whitbeck paid \$1,142, which he claims as an offset to the remaining note, leaving but a small amount of the purchase money unpaid.

Mr. *H. B. Brown*, for libellants.

Connors swears that, at the time he received the \$2,000 in negotiable notes of Whitbeck, he informed him of the amount of the claims on account of which the notes were given. Whitbeck denies this, but admits the notes were given *on account* of these claims. Paying \$2,000, as he did, upon these claims, he was bound to inquire their amount, and cannot now plead his ignorance. He cannot shut his eyes and claim the rights of a *bona fide* purchaser.

But irrespective of notice, libellants have been guilty of no laches, and are entitled to recover, as the vessel was not

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once in the district, to their knowledge, until she was attached. General admiralty rule requires that every libel *in rem* should state that the "property is in the district" (*The Sarah Ann*, 2 Sum. 212; *The General Jackson*, 1 Sprague, 554; *Burk v. Brig Rich*, 1 Cliff. 308; *The D. M. French*, Lowell, 43). The question is, has the libellant used due diligence, considering all the circumstances of the case? (*The Bark Chusan*, 2 Story, 458; *The Rebecca*, Ware, 212; *The Lillie Mills*, 1 Sprague, 307; *The Eliza Jane*, 1 Sprague, 152; *The Bolivar*, Olcott, 480).

Claimant must be a *bona fide* purchaser at the time of payment, as well as at the time of the sale (*Blanchard v. Tyler*, 12 Mich. 339).

Mr. W. A. Moore, for claimant.

Whitbeck was a *bona fide* purchaser of the vessel, without actual notice of the existence of the claims at the time of the purchase, or that they were outstanding and unpaid at the completion of the purchase price:

1st. By the terms of purchase the title was to be perfect, and the vessel free of liens and incumbrances; and, to secure that, five notes were made non-negotiable.

2d. Rogers and Connors asked for two of the notes to be made negotiable, to pay libellant's claims. No claim for more was made, nor was more ever requested to pay any claims at any time.

3d. The remaining two \$1,000 notes were left by Rogers at his bank, and they were paid at or soon after maturity, which Whitbeck would not have done, if he had supposed other claims were outstanding.

4th. The note for \$1,287 50 was not paid, because Whitbeck supposed that it was settled by payment of mortgage on the vessel, and costs and expenses connected therewith.

More than one year elapsed after the debts were contracted before any proceedings were taken against the vessel.

1st. The vessel made one trip to Buffalo and return, and

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therefore, although she may not have stopped at Port Huron, she passed there twice, and must have been for at least from thirty to forty hours within the jurisdiction of this Court.

2d. The balance of two seasons of navigation she was accessible, by writ from the District Court of the Western District of Michigan, or of the Northern District of Illinois.

3d. That libellants cannot plead ignorance of the whereabouts of the vessel, for they knew where she was in the summer of 1871, while their agent was endeavoring to collect, in Probate Court in Chicago, the home port of the vessel.

In this case the libellants had an opportunity to enforce their claim *in rem*, in the spring of 1871, from this District, for the remainder of the season of 1871, in the Western District of Michigan and the Northern District of Illinois.

They permitted the vessel to pass into a *bona fide* purchaser's hands, and permitted him to pay the purchase price, without putting the purchaser upon inquiry until after more than one year had elapsed.

Under the law, as construed by this Court, the claim has become stale (*The Buckeye State*, Newberry, 111, 114, 115; *The Dubuque*, 2 Abb. U. S. 20; *Willard v. Dorr*, 3 Mason, 91; *Brown v. Jones*, 2 Gall. 477; *The Mary*, 1 Paine, 180; *The Sarah Ann*, 2 Sumner, 207; *Pitman v. Hooper*, 3 Sumner, 286; *Jay v. Allen*, 1 Sprague, 130; *The General Jackson*, 1 Sprague, 554; Benedict's Admiralty, 575; 2 Parsons on Shipping, 361).

LONGYEAR, J. I. There is no direct evidence that Whitbeck had notice of the particular liens in question at the time of his purchase. The fact, however, that he took the precautions he did to protect himself against liens affords a strong presumption that he knew there were liens then in existence, and to a considerable amount, in addition to the chattel mortgage; and if he knew that much, it would be but a short and reasonable step further, to hold him responsible for the additional knowledge of what those liens were and by whom

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they were held, especially in the absence of all proof that he made any effort to gain such knowledge, or that it was withheld or concealed from him. But, as we shall presently see, it is unnecessary in this case to resort to such presumptions.

II. Notice to the purchaser while a sufficient amount of the purchase money remained unpaid to meet the liens, is as effectual to keep the liens alive as it would be if he had such notice at the time of such purchase, especially where, as in this case, the balance of purchase money was not secured by negotiable paper. At the time Whitbeck took up the two \$1,000 non-negotiable notes and gave negotiable notes in lieu, for the purpose of raising money to pay on these claims, there was then still remaining unpaid on the purchase money an amount more than sufficient to pay the balance of these claims in addition to the chattel mortgage. Then, if not before, he had notice of the existence of these specific claims. But he insists that, because only \$2,000 was then demanded of him, he had the right to suppose that the claims represented by Connors, with whom he did the business, were no more than that in amount, although he makes no pretense that any such representation was made by Connors, or that the payment then made was understood to be in full. On the contrary, Connors testified that he thought, as it is quite reasonable he would have done, that he told Whitbeck at the time what the claims amounted to. This was not positively denied by Whitbeck, although he said he did not recollect the fact, and thought it was not so. At all events, and this is conceded by Whitbeck, he was then informed, and knew, if he did not before, that the claims were on file in the Probate Court, where they were readily accessible to him at any time he might desire to examine them. He also admitted that he may have gone to the Probate Office and examined the claims, but as to whether he did or did not, his recollection was again quite indistinct. He knew, however, that the information was within his reach, and that it was readily accessible, and if he failed to avail himself of it, he must suffer the consequences of his neglect, and be held responsible for the knowledge he

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would have gained if he had made the requisite examination. Finally, taking all the proofs together, and taking into consideration the nature and character of the transactions in question, and in view of what a reasonable business man, engaged in an important business transaction, would naturally and almost inevitably do in the same circumstances, the Court cannot avoid the conviction that Whitbeck not only must be presumed to have known, but that he actually did know that there were balances of these claims unpaid, before he paid the remaining two \$1,000 notes to the administrator. Therefore, upon all considerations, Whitbeck cannot be granted any exemption from the liens claimed by libellants, for want of notice.

III. Laches on the part of libellants in prosecuting their liens could be made available, if at all, in this case, only in case of want of notice of the liens to Whitbeck as a subsequent purchaser. As the Court has already decided that Whitbeck is chargeable with such notice, a consideration of this point is unnecessary.

It results, that libellants must have decrees in their favor for the balances due them respectively, including interest to this date, and for costs.

Decree for libellants.

The Iosco.

THE IOSCO.

JUNE, 1874.

MATERIALS.—CONSTRUCTION OF VESSEL.

A hull completed at the place of launching received a small cargo of flour as ballast, was towed with her spars on deck to another port, where her masts were stepped, and the vessel put in condition for navigation:

Held, that the work was done in *building* the vessel, and that admiralty had no jurisdiction.

LIBEL for repairs and materials.

The hull of the schooner was built at Alabaster, in this district, and put into the water. The hull was then towed to Bay City, with her topmasts, booms and gaffs on deck, and towing her two masts, to have the same put in place, and to be otherwise completed in the several appointments of a completed vessel, at the latter place, where the same was done by the libellants, and the doing of which constitutes the cause of action in this case. When the hull was so towed from Alabaster to Bay City, it had on board, for ballast, a quantity of flour, some shingles and some knees, to be used so far as necessary in completing the construction of the vessel.

The only question in the case is whether libellants have a lien and an action *in rem* in the admiralty.

Mr. W. A. Moore, for the libellant.

Mr. H. B. Brown, for claimant.

LONGYEAR, J. Whether the claim of libellants arises out of a maritime contract, and whether they have a right of action in this Court *in rem*, depends upon the question of fact whether what libellants did and furnished were to and for a vessel already in existence, or whether they were so done and

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furnished in part to bring her into existence as a complete thing. If the former, then the action will lie. If the latter, it will not lie, and this Court has no jurisdiction. It was so settled fully and definitely by the Supreme Court in December term, 1857, in the case of *People's Ferry Company v. Beers* (20 How. 393), and reaffirmed in December term, 1859, in the case of *Roach v. Chapman* (22 How. 129).

In the mind of the Court there is no room for doubt or discussion as to the question of fact. What libellants did and furnished were clearly by way of completing the construction of the vessel, and constituted in no sense within the meaning of the maritime law, repairs and materials, and for which by that law an action *in rem* will lie.

It makes no difference that the vessel was in the water. It is always the case that a portion of the construction of a vessel is done after she has been put in the water. Neither is there anything in the position of libellant's advocate, that the schooner had to all intents and purposes assumed the position and liabilities of a vessel by taking in and transporting freight on her trip from Alabaster to Bay City, and that therefore what was done and furnished to and for her at the latter place by libellants, must be deemed as repairs, etc. The undisputed testimony is that the flour, etc., were taken as ballast. But even if this were otherwise, the position could not be maintained, because it clearly appears that the vessel was not so far completed at the time as to enable her to discharge the functions for which she was intended, and that the sole purpose of the trip was to avail her owners of the greater facilities of Bay City to complete her construction, and that the taking on of the flour, etc., was a barely incidental matter.

I hold, therefore, that libellant's claim is for construction merely, and consequently, upon authority of *People's Ferry Company v. Beers* (*supra*), an action *in rem* will not lie.

Libel dismissed.

NOTE.—See *contra*, *The Eliza Ladd* (8 Chic. Legal News, 98).

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THE ILLINOIS.

AUGUST, 1874.

PLEADING.—NECESSARY AVERMENTS IN LIBEL.—ACT OF 1845.

A libel sufficient under the general maritime law is sufficient in cases arising upon the lakes, and no averment is required to bring it within the Act of 1845.

It is unnecessary to aver that the vessel in question is engaged in navigation, or capable of being so employed.

THE libel was *in personam* against the respondent as owner of "the barge Illinois, her boats," etc., for supplies. There was no other or further description of the vessel set up in the libel than that quoted. The grounds of demurrer were: 1. That it was not alleged in the libel that the vessel was of 20 tons burden or upward; 2, nor that the vessel was enrolled or licensed for the coasting trade; 3, nor that the vessel was employed in the business of commerce and navigation, or was capable of being so employed; 4, nor in any manner that the vessel, her boats, etc., were of such a maritime character as to entitle the Court to entertain jurisdiction in the premises.

Mr. *F. H. Canfield*, for the respondent.

Mr. *H. B. Brown*, for libellant.

LONGYEAR, J. The libel is in the usual form of libels *in personam* under the general maritime law (2 Conk. Adm. 478, *et seq.* 482, 488; Ben. Adm. 484, No. 83). The allegations, the absence of which constitute the first three grounds of demurrer, were necessary in order to confer jurisdiction under the Act of Congress of February 26, 1845 (5 Stat. at Large, 726), entitled "An Act extending the jurisdiction of the District Courts to certain cases upon the lakes and navigable waters connecting the same" (2 Conk. Adm. 491 and note *a*). But the Supreme Court in the case *The Eagle* (8 Wall. 15), adopting the only logical conclusion from their earlier decision in

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the case of *The Genesee Chief* (12 How. 443), authoritatively decides that general admiralty jurisdiction was not limited in this country to tide waters, but extended to the lakes and the navigable waters connecting them, and hence that the Act of 1845 was inoperative and ineffectual, with the exception of the clause which gives either party the right of trial by jury when requested. Since that decision the limitations as to jurisdiction imposed by the Act of 1845, have had no existence, and the necessity of inserting in the libel the allegations in question has ceased; and consequently, a libel which is sufficient under the general maritime law is now sufficient in cases upon the lakes and their connecting waters (see *The General Cass*, ante, p. 334). The first, second and third grounds of demurrer are therefore not well taken.

As to the fourth ground of demurrer, I find no adjudications or opinions of text writers upon the point; but judging from the forms adopted and universally used from an early period in admiralty jurisprudence down to the present time, it seems to have always been considered sufficient to describe a vessel in a libel, whether *in rem* or *in personam*, as the ship, bark, sloop, schooner, steamboat, steamer, barge, or as the case may be, giving her name, without further specification or qualification (see 2 Conk. Adm. 490, note a). These terms seem always to have been considered sufficient to denote the maritime character of the subject. In their ordinary meaning they signify maritime things, and, independently of the consideration of long usage, the use of those terms alone is no doubt sufficient to confer jurisdiction without further description or qualification. The rest follows by necessary implication. If the fact be different, it must be taken advantage of by way of special allegation, and cannot be by way of demurrer. The fourth ground of demurrer is, therefore, also not well taken.

The demurrer must be overruled, with costs of the demurrer to libellant, with leave to respondent to answer the libel, on condition of payment of the costs of the demurrer, including a counsel fee of \$10.

Demurrer overruled.

The Clematis.

THE CLEMATIS.

AUGUST, 1874.

DESERTION OF TOW BY TUG.—JUDGMENT OF MASTER.

Where a tug abandons her tow of barges during a storm, the burden is upon the tug to show a sufficient excuse for such abandonment.

Much, however, must be left to the judgment of competent officers in such an emergency, and such judgment formed upon the spot and acted upon in good faith will not be impeached, except upon a clear preponderance of proof that it was erroneous.

Where it was shown that the tow-line parted in the night, during a storm of great severity, and that the master of the tug was unable to pick up the line, to discover the lights of the tow, or to make any efforts to regain it without great danger to the tug: *Held*, he was justified in abandoning it.

THIS was an action for breach of duty, resulting in the loss of the barge Mohawk, by reason of the alleged unlawful desertion of the same during a storm in Lake Huron. On October 30th, 1870, the tug Zouave left Saginaw with six barges in tow, bound to Cleveland. On arriving off Pointe aux Barques, the weather became rough, and the tow put into Port Austin Bay for shelter. Here they found the Clematis. The tow was then divided, and, at the request of the master of the Zouave, the Clematis took three of the largest barges, of which the Mohawk was one, and put to sea, about half past seven in the evening. Although the storm continued to increase in violence, everything went well, the barges losing none of their deck loads, until about eleven o'clock, when the line connecting the tug with the forward barge parted, and set the tow adrift. The tug turned around, but failing, as her officers alleged, to see the lights of the tow, made no efforts to pick them up, and in a few minutes resumed her course down the lake. During the night, the Mohawk went to pieces, and was lost, with a part of her crew.

Messrs. *H. B. Brown* and *W. A. Moore*, for libellant,

Mr. Alfred Russell, for claimant.

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LONGYEAR, J. The libel, as amended, contains one, and only one, charge of fault, viz.: That the tug negligently deserted the tow; which charge, as set up in the amended libel, is in the following words: "That after taking the said barges in tow as aforesaid, and upon the night of the said 30th of October, the said barges Mills, Mohawk and Holland, being attached to said tug by lines astern in the order last above stated, the said tug Clematis, when off and about abreast of Pointe aux Barques, the lake being then somewhat rough, and the said barges being then solely dependent upon the said tug for their safety, and the line connecting her with the said barges having parted, without rounding to or stopping, negligently deserted said barges, with their cargoes and crews, and left them to their fate." Upon the argument, other faults were sought to be pointed out, and were urged with some earnestness, but, as the above is the only fault charged in the libel, it is the only one that can be considered.

The answer admits that the tug left the tow after the line had parted, but denies that she did so without rounding to or stopping, or negligently, as alleged; and avers that she not only rounded to, but for about an hour made exertions to find and secure the tow, and that she left only when it was found to be impossible, on account of the darkness of the night and the severity of the storm. The answer also alleges that the barge was unseaworthy in several respects, and that she failed to ride out the storm, and was lost on that account.

It is undisputed that, when the line parted, a storm was in progress of greater or less severity, but at all events of such severity as to endanger the safety of the vessels composing the tow if left to their fate (being vessels of the kind called barges, and dependent solely upon towage, instead of any efficient means of propulsion of their own); also that the tug did in fact fail to regain the tow, and did leave the vessels composing it to their fate. In view of these undisputed facts, the burden was on the tug to show a sufficient excuse for such failure and abandonment; and it is to this one point that the issue in the case is really narrowed down.

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There is a preponderance of proof that after the line parted, the tug, after keeping on her course a short distance, rounded to, and for a short time, variously estimated by the witnesses at from fifteen minutes to an hour, stood up toward where she left the barges, and then, not finding them, and not seeing any lights by which to determine their whereabouts, and the darkness being such that except by means of lights they could not be seen from the tug until the tug should be too near them for safety in such a storm, and the tug's captain, for these reasons, deeming it useless and unsafe to attempt to find the barges, and if found, to attempt to approach them so as to regain the line, without further effort abandoned the attempt, and came in toward the land for shelter, and made no further effort to rescue the barges until the next day, in the afternoon, when the storm had abated. It certainly would have been more satisfactory if the tug had made a more persistent effort to find the barges and pick them up; yet, if the storm was in fact of such severity as to render such further effort hopeless under the circumstances, the want of it cannot be attributed as a fault.

The business of towing by steam vessels has come to constitute one of the great interests of navigation—so much so upon the great lakes and their connecting waters that it has brought into existence a class of vessels of great carrying capacity dependent almost solely upon being towed as a means of propulsion. Hence steam tugs, making the towing of vessels a business, often necessarily assume great responsibilities; and it is but fair and right that they should be held to a strict account in the manner of the discharge of their important duties. It will not do to hold that they may excuse themselves and abandon the safety of interests, and often of lives, intrusted to and dependent upon their courage and fidelity, for slight causes, or on account of even ordinary obstacles. The causes must be ample, and the obstacles in the way of performance must be at least of an extraordinary character, if not absolutely insurmountable. Questions of this character are, however, often among the most difficult to determine. Of the truth of

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this the present case is a marked instance. Storms and their severity are so variable in degree, and the opinions of even competent and experienced seamen in regard thereto in any given case are often so conflicting, as is the case here, that in most cases it is exceedingly difficult to decide in regard to them with any degree of nicety or satisfaction. In all such cases much must be left to the judgment of the officers in charge during the emergency. They have the circumstances then all before them far more clearly and intelligibly than they can possibly be reproduced in Court; and when such officers are able, competent and experienced navigators, a judgment formed upon the spot, and acted on by them in good faith, ought not to be impeached or disregarded, except upon a clear preponderance of proof that it was erroneous (*Lawrence v. Minturn*, 17 How. 109, 110). The general ability, competency and experience of Capt. Ramage, of the tug, is in no manner questioned nor assailed. It is in evidence that in his judgment at the time, the severity of the storm, combined with the darkness of the night and the absence of lights by which the whereabouts of the barges could be determined, rendered it impossible for him to regain them, and extremely hazardous to make the attempt, and the good faith of that judgment is not impugned. Its correctness only is questioned. Capt. Ellery, of the Mills, the head barge, and to which the tug's line was attached, seems by his actions to have entirely coincided with Capt. Ramage in opinion, in this, that he made no preparations, and was in fact entirely unprepared to second any attempt to regain the tow should any such attempt be made by the tug, but, on the contrary, confined his exertions entirely to means of safety at his own command.

I have examined and analyzed with care the voluminous and somewhat conflicting testimony upon this point, and the able and exhaustive arguments of the learned counsel on both sides, but shall not extend the opinion by going into that analysis here. It must suffice here to say that while I am in some doubt, I fail to find in the proofs that clear preponderance necessary, in my opinion, to overcome the opinion and

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judgment of Capt. Ramage formed upon the spot and acted on by him, and that I therefore consider it my duty to give him the benefit of the doubts I entertain.

In this view of the case, it is unnecessary to notice the question of the unseaworthiness of the barge, raised by the answer.

Libel dismissed.

THE THOMAS A. SCOTT.

AUGUST, 1874.

COLLISION WITH VESSEL AGROUND.—NARROW CHANNELS.—STOPPING.
—JUDGMENT OF MASTER.

A vessel can be held in fault for her conduct only to the extent of risk or danger of collision with another vessel, as indicated by the relative situation of such other vessel at the time she determines upon a particular course of action, making proper allowance for the probability of a change in the relative situation of such other vessel.

It is not improper, under any and all circumstances, for a steam vessel to enter the old channel of St. Clair flats, and attempt to pass through, while another vessel is aground upon one of its banks. It depends upon the apparent situation and circumstances of the vessel aground.

A vessel aground in a narrow channel, but in a situation to admit of other vessels passing her in safety, should, on the approach of another vessel, cease her efforts to get off until such other vessel has passed.

Where a schooner aground upon St. Clair flats, upon an even keel, with room for other vessels to pass, saw a large propeller approaching, and did not cease her efforts to get off, but swung partly across the channel: *Held*,

- (1) That the propeller was not in fault for coming down the channel with the intention of passing the schooner while aground.
- (2) Nor was she in fault for pushing on and attempting to pass the schooner on her starboard side, instead of stopping and backing.
- (3) Having been placed in sudden peril by the fault of the schooner, the master of the propeller could not be blamed when, in the exercise of his best judgment, he adopted a course which may have been erroneous.

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LIBEL for damage done to schooner Fred. A. Morse, by a collision upon St. Clair flats.

The schooner Morse, of 592 tons burden, arrived off the entrance to the flats, in tow of the tug Brockway, at 7 A. M., and lay there about two hours, waiting for the propeller Vanderbilt, then aground on the flats, to get off. As the propeller floated, she passed up the channel; and the tow supposing her bound up, entered it. The Vanderbilt, however, after passing the range lights, winded around, and came down the channel, meeting the tow about the middle stake. The swell was so great, she forced the Morse aground, on the starboard side of the channel, about 100 feet above the middle, where she lay on an even keel till just before the collision.

Several propellers were lying at the Club House above the flats, waiting for the Vanderbilt to get off. The Thomas A. Scott, among the rest, had lain there two days. Seeing the Vanderbilt released, they all started down, the Fisk and Gould ahead. These two, as well as the bark Erastus Corning (a large grain vessel), in tow of a tug, passed the Brockway and Morse on their port side. The Scott followed, and after passing the range lights, observing the bow of the schooner swing two points to the port, whistled twice; the Brockway responded, and the Scott starboarded, and attempted to pass the tow on *its* starboard side, grounded a little below the stern of the schooner, forced her off and across the channel. The current swung her stern into the schooner and damaged her.

Mr. *H. B. Brown*, for libellant.

The propeller was in fault—

(1) In entering the channel at all while the schooner was aground.

It is admitted the master of the propeller saw the schooner aground, and the tug at work upon her. He was bound to know the tug would pull her off some time, and that in swinging off, her bow would obstruct the channel more or less. If the master insisted upon going down and encountering this

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contingency, he took upon himself the risk, and must answer for the consequences (*The Milwaukee*, ante, 313; *The Vicksburg*, 3 Ben. 298; *The Helen R. Cooper*, 2 Ben. 67; *The Geo. Law*, 3 Ben. 396; *The St. John*, 7 Blatch. 220; *The Germania*, 3 Mar. Law Cases, 269).

In this connection, I refer to the rules of the supervising inspectors for the Western rivers, which forbid vessels entering narrow channels while others are passing through in an opposite direction. Though not in terms applicable to St. Clair flats, it is but an enunciation of a general rule as to navigation in narrow channels.

(2) In going at too great speed, and in not stopping and backing before the peril became imminent.

Her actual rate through the water is of small consequence. She was bound to keep herself entirely under control (*The Alleghany*, 9 Wall. 522). Precautions to avoid a collision must be seasonably taken (*The Vanderbilt*, 6 Wall. 225; *The Russia*, 3 Mar. Law Cases, 290). A vessel has no right to thrust herself into danger, and then complain that the consequences were inevitable. Best evidence of the speed of the propeller is the fact that, although she drew nearly two feet more water than the *Morse*, she did not fetch up until she had passed the stern of the *Morse* (then hard aground) from 20 to 50 feet.

Mr. W. A. Moore, for the claimant.

There was no fault on the part of the propeller, and the collision must have been the result of inevitable accident (*The City of London*, Swabey, 300; *The Marpesia*, L. R. 4 Priv. Council, 212; *The Morning Light*, 2 Wall. 550; *The Grace Girdler*, 7 Wall. 203).

Burden of proof, where inevitable accident is charged, is upon the party seeking to hold the other in fault (*The Bolina*, 3 Notes of Cases, 208; 1 Pars. on Ship. 527).

LONGYEAR, J. 1. In the absence of positive law applicable to the case, a vessel can be held in fault for her conduct only to the extent of risk or danger of collision with another vessel, as indicated by the relative situation of such

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other vessel at the time she determines upon the particular course of action in question, making all proper and reasonable allowance for the probabilities of a change of the relative situation of such other vessel. It was not contended, and if it had been, I should not be prepared to hold that, as applied to the particular locality here in question (the old channel on the St. Clair flats), it is improper, and a fault under any and all circumstances, for a vessel, especially a steam vessel, to enter the channel, and attempt to pass through, while another vessel is aground upon one of the channel banks; and the above rule is enunciated as applicable to this case, on the assumption that is not improper, under any and all circumstances; or, in other words, that it may be proper or improper, a fault or not a fault, according to the situation and circumstances of the vessel aground apparent at the time of entering the channel.

What, then, was the apparent situation of the Morse when the Scott entered the channel? She was bound up, and was aground on the, to her, starboard channel bank, on an even keel, lying parallel with the channel, and leaving ample room for vessels of the largest size to pass her in safety. This was not only apparent from observation, but it had been made certain to the Scott by the fact that three vessels, each one as large as herself, had just passed through. Thus far, therefore, there was no impropriety in entering the channel and making the attempt to pass through. But it was said the efforts to get the Morse off then in progress were also apparent; and it was claimed that a probability of the position of the Morse being changed before the Scott could pass her ought to have been also taken into consideration, and that such probability rendered it improper to enter the channel while those efforts were going on. To that proposition I cannot give my unqualified assent. I think it more reasonable and consonant with the interests of navigation to hold that a vessel aground in a narrow channel, but in a situation to admit of other vessels passing her in safety, should, on the approach of another vessel, cease her efforts to get off until the other vessel has passed. To require other vessels, under such circumstances,

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to await the result of such efforts, would be contrary to universal practice, would tend to a serious hindrance to navigation, and would often occasion serious detriment to vessel owners who are in no manner in fault for the obstruction to the channel. A vessel aground in a situation not admitting of other vessels passing her in safety, presents, of course, a very different case, and one to which the foregoing has no application.

The Scott was, therefore, not in fault for entering the channel as she did, and the first charge of fault is not sustained.

2. That the Scott's speed was too great under the circumstances. I think there is a decided preponderance of proof that as soon as the Morse swung out into the channel, the speed of the Scott was checked down to not exceeding four miles an hour, and that, having decided not to stop entirely, but to make the attempt to pass the Morse on her starboard side, her engine was stopped and reversed as soon as it was safe or necessary to do so. To have gone at a much less speed would have endangered her steerage way and her fetching up on the bank, and to have stopped and reversed sooner would have tended to swing her bows against the Morse.

The second charge of fault is, therefore, not sustained.

3. That the Scott did not stop and reverse her engine until a collision had become inevitable.

As we have already seen, the Scott was rightfully in the channel. If the Morse, when she saw the Scott approaching, had, as I think she ought to have done, desisted from her effort to get off until the Scott had passed, the accident would have been avoided. But she continued her efforts, and by doing so, threw herself athwart the channel and across the bows of the Scott, and that was the primary cause of the collision. Notwithstanding that, however, it was the duty of the Scott to avoid her if she could. Libellants' advocate contended that good seamanship required that the Scott should have stopped at once when she saw the Morse swing out across the channel. That it was within the power of the Scott to stop in time clearly appears by the proofs—the proofs

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showing that when the Scott saw the Morse swing out, the two vessels were from 500 to 600 feet distant from each other, and that the Scott, at the rate she was then running, could be stopped in about 200 feet. But it must be borne in mind that she was going with the current, and that the channel was too narrow to turn round with safety, and if she stopped, she was in danger of drifting upon the bank and getting aground herself. The master of the Scott, taking in the whole situation, and using his best judgment, as matters then and there appeared to him, thought that by checking and changing his course, he could safely pass the Morse on her starboard side, instead of on her port side, as he had intended, but which, on account of the manœuvres of the Morse, had become impossible, and he acted accordingly. The result proved his judgment correct, so far as to his being able to get his vessel by the Morse, between her and the starboard channel bank; and it is evident that he would have gone entirely clear, if the bow of the Scott had not brought up on the bank before she had entirely passed the Morse, causing her stern to swing round against the Morse, and doing the damage complained of.

It may be that if the Scott had stopped, instead of making the attempt to pass after the Morse had changed her position, any accident to either vessel would have been avoided. But that is merely conjectural and speculative, and it must be borne in mind that the emergency was brought about by the Morse herself; that the master of the Scott had but a few moments in which to deliberate; that he had the circumstances and situation all before him, and in view of them decided upon his course—a decision which the result showed was at least not an unreasonable one—and the accident happened, as we have seen. Under all these circumstances, it would not be reasonable or just to charge the Scott with fault for doing as she did instead of stopping, even if the probabilities were stronger than they are that by stopping the accident would have been avoided.

The third charge of fault is therefore not sustained.

Libel dismissed.

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THE SWEEPSTAKES.

SEPTEMBER, 1874.

COLLISION.—TUG AND TOW.—DIVISION AND ORDER OF TOW.—
FASTENING OF LINE.

A request by the masters of a tow to divide the vessels composing it, and take them separately through a narrow channel, would not create an obligation on the part of the tug to do so. It is the duty of the master of the tug to make up the tow, and he is entitled to exercise his judgment in that regard.

In arranging the order of vessels in tow, regard should be had to dangers incident to any portion of the route covered by the undertaking, and in passing through the channel of St. Clair flats the vessel of heaviest draft should be placed last.

The rule of the supervising inspectors requiring ascending vessels to stop before entering narrow channels, and wait till a descending vessel has passed through, does not apply to the lakes and their connecting waters.

In the absence of usage or positive law, it is not a fault for a tow to enter the channel of St. Clair flats while another tow is coming through in an opposite direction.

It is the duty of the tug to see that the tow-line is securely fastened, so as to hold in all emergencies likely to happen, ordinary or extraordinary, and the fact it does not so hold is the best evidence the duty is not performed.

Tugs are *prima facie* responsible in all cases for damages resulting from the slipping of the line.

ON libel for towage and cross-libel for collision.

H. Norton Strong, owner of the tug Sweepstakes, since deceased, libeled the schooners Dobbin and Atmosphere, in separate suits, for towage services in the sum of \$109 in the case of the Dobbin, and \$81 in the case of the Atmosphere. The services were for towing the schooners as alleged in the same tow and in company with a third vessel, the schooner Couch, on the 14th and 15th days of October, 1872, from Lake Erie to Lake Huron.

Thereupon Frank Perew, owner of the Dobbin, and Valentine Fries and Malcolm Stalker, owners of the Atmosphere, respectively put in their answers and filed cross-libels against

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the tug. By their answers and cross-libels they admitted the undertaking on the part of the tug, and the prices agreed on, as alleged, but charged fault and negligence on the part of the tug, and the consequent grounding of the head vessel in the tow in the channel on St. Clair flats, by which the vessels were caused to collide with each other, resulting in damages to the Dobbin in the sum of \$8,000, and to the Atmosphere in the sum of \$2,100, as claimed.

The cross-libels charged the tug with the following specified faults:

1. That she did not divide the tow and take the two schooners through the channel separately from the Couch, as her master was requested to do by the masters of those schooners.

2. That she did not arrange the tow so as to have the lightest draft vessel first.

3. That she did not stop and wait at the lower end of the channel for a descending tow to pass through.

4. That she did not properly and securely fasten her end of the tow line, but negligently permitted it to slip off.

Libellant Strong having died pending the litigation, his executor, Thomas Pitts, was admitted to prosecute the suits.

Both suits and the cross-libels were heard together, and upon the same proofs.

Messrs. *F. H. Canfield* and *G. V. N. Lothrop*, for the tug.

Messrs. *W. A. Moore* and *H. B. Brown*, for the schooners.

LONGYEAR, J. 1. As to the first charge of fault, in not dividing the tow, I am aware of no positive rule upon this subject, and no general duty in this regard, growing out of usage or otherwise, was shown, nor is it believed to exist. Whether it was a duty or not, therefore, depended, as it must depend in all cases, upon the special circumstances of the case in hand. A request on the part of the vessels comprising the tow would not of itself create a duty. The tug master was as much entitled to his opinion, as to the necessity, as were the vessel

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masters to theirs—in fact more so, because it was his right to say how the tow should be made up and taken through. Whether his decision was right or wrong, and if wrong, a culpable fault, depended upon the appearances when it was made, and not by what happened afterwards, unless what so happened might and ought to have been anticipated, and was in fact the result of taking the three vessels through together. But it nowhere appears that the grounding of the Couch was caused by there being three vessels in the tow instead of only two. *Non constat*, the same thing might have occurred if the Dobbin and Atmosphere had been taken through without the Couch, as requested.

The first allegation of fault is therefore not sustained.

2. As to the arrangement of the vessels in tow with reference to their difference in draft.

The case of *The Zouave and Rich* (*ante*, p. 110), decided in this Court by my learned predecessor, the late Judge Wilkins, was, in its facts and incidents, almost identical with the present case in regard to the point now under consideration. In that case it was held that it was not good seamanship, and was a fault for the tug master to so arrange his tow, in towing over the St. Clair flats, as to have the vessel of heaviest draft first in the tow. The only difference between that case and this is, that then the tow was going down, and here it was going up. No distinction, however, is noted on that account, neither do I presume that any exists in principle. It is true, in coming down, the current would add so much to the velocity and momentum of the vessels, and make it more difficult for those in the rear to steer clear of those forward of them, and to strike harder and do more damage in case of a grounding and collision. But the difference is not radical—it is only in degree. The current is very weak there, not exceeding two or two and a half miles per hour, and not sufficient to overcome the momentum of vessels moving against it in a tow at an ordinary and allowable rate of speed, so as to prevent a collision by the rear vessels in case of the grounding of any of the forward ones, especially so when, as in the present case, there was a brisk

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wind directly up the channel, or very nearly so. At all events, the current did not stop the rear vessels in the present case in time to prevent a collision and serious damage.

In the present case the vessel of greatest draft, the Dobbin, was placed second in the tow; the next heaviest, the Couch, first, and the lightest, the Atmosphere, last. But the Couch alone grounded, and the arrangement of the vessels in the tow being proper as between her and the Dobbin, nothing can be claimed under this charge of fault on account of damage done the Dobbin by her running into the Couch. But the arrangement was not a perfect one as between the Couch and the Atmosphere, the former being of the greater draft, and being placed forward of the latter in the tow. Therefore, as far as the Atmosphere was concerned, the tug committed a fault in this respect, which, on the authority of *The Zouave* (*supra*)—to the reasoning and conclusion of which I agree—would make the tug liable, so far as concerns the damage done to both the Dobbin and the Atmosphere, by the latter running into the former, unless the Atmosphere could have avoided the Dobbin, of which, however, I believe there is no pretense.

Tugs have the right to direct how their tow shall be made up. In all cases, in arranging the order of the vessels in the tow, the tow should be made up with reference to dangers incident to any portion of the route covered by the undertaking. Here the St. Clair flats were so covered, and the tow should have been made up with the same care in this regard as if the undertaking covered that portion of the route only; or, at least, if not so made up originally, it should have been changed to meet the case when the Flats were reached.

The channel on St. Clair flats is quite narrow and somewhat crooked—vessels do sometimes ground there. There is, to say the least, a liability to ground or risk of grounding there; and that is sufficient to impose the duty now under consideration. That vessels usually or frequently ground there was not necessary to be shown.

The second allegation of fault is therefore sustained.

3. In not waiting for the downward tow to pass through before entering the channel.

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The rule of the supervising inspectors, requiring that when two vessels are about to enter a narrow channel at the same time, the ascending vessel shall be stopped below such channel until the descending vessel shall have passed through it, etc., has no application *ex proprio vigore* to the lakes and their connecting waters, and therefore not to the present case, as was contended. It applies only to the rivers flowing into the Gulf of Mexico and their tributaries (see Rules of June 12th, 1871, "For Western Rivers;" also caption to "Pilot Rules for Lakes and Seaboard," of June 10th, 1871).

No such rule, I believe, exists by virtue of any positive law or regulation, or by the decisions of Courts, in regard to the lakes and their connecting waters; no good reason is apparent, however, why, on principle, it should not apply as well to narrow channels, of which there are many connecting the lakes, and through which the path of a vast navigation lies, as to Western rivers. However, in the absence of positive law and of any common usage to support it, I do not conceive that the Court can lay down any general rule upon the subject. Each case must be governed by its own peculiar circumstances. Certainly no Court would hold a tug blameless that should recklessly, whether ascending or descending, lead a tow into a narrow channel, like that on the St. Clair Flats, when crowded with vessels moving in an opposite direction. But I think the Court would hardly be justified in applying such a rule to even an ascending tug, when, as in this case, another tug was about entering or even had entered the channel from the opposite direction with a single vessel in tow. It would be contrary to common usage to require a tug to wait under such circumstances; neither is it hazardous to any considerable extent for tugs with even more than one vessel in tow, if properly arranged and properly managed by all concerned, to attempt to pass each other in that channel, nor is it so deemed by competent navigators.

The third charge of fault is, therefore, not sustained.

4. In not properly fastening the tow line. If the charges of fault were to be determined solely by the expert testimony

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as to the mode of fastening adopted, it would have to be decided that the line was properly fastened, as far as the mode of fastening is concerned. But the question raised goes beyond the mere *mode* of fastening. Conceding the mode to have been correct, the real question is, was it properly and securely fastened according to that mode.

Undoubtedly it was the duty of the tug to see that the line was *securely* fastened, no matter what mode of fastening was adopted, and so as to hold in all emergencies likely to happen, whether ordinary or extraordinary ; and the fact that it did not so hold is the best evidence that the duty was not performed. I know of no safe rule other than to hold tugs responsible *prima facie* in all cases, for injuries resulting from the tow line slipping or giving way from its fastening upon the tug. The expert testimony shows, and without it common sense teaches, that a tow line can be fastened so that it will not slip, and therefore the above rule is not unreasonable (*The Quickstep*, 9 Wall. 665 ; *The Olive Baker*, 4 Ben. 173).

This view of the matter narrows the controversy upon this point down to the question whether the Couch grounded before the line slipped, or whether the line slipped first and the grounding was on that account ; because, if the former, then the slipping of the line cannot be attributed as the cause of the disaster, although it may be evidence of a faulty fastening ; but if the latter, then it may have been the direct cause, and the fact of slipping alone sufficient, unexplained, to hold the tug responsible for all the unavoidable consequences of the grounding.

As to this very material point, the testimony was conflicting. That of the officers and men upon the tug, on the one side, and of those upon the Couch and the other vessels composing the tow, upon the other, were in direct and irreconcilable contradiction of each other. These extremes stand upon an equality as to interest, those upon each side being anxious and desirous, of course, to fasten the blame upon the other, and if there were no other testimony it would be exceedingly difficult to come to

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anything like a satisfactory conclusion. But there was other testimony, and that must turn the scale.

The officers and men upon the Lion and the Perew, the passing tug and tow, fully corroborated those upon the Couch, and the other vessel composing the tow. Their witnesses had an opportunity of observing, equal at least to those upon the tug, and greater than those upon the Dobbin and the Atmosphere, and they had no interest to see things as they were not. Their testimony is therefore entitled to the greater weight. It must be borne in mind, also, that the officers and men upon the Couch were in a better situation than any of the others to know what occurred first, and therefore their testimony, aside from the question of interest, which as between them and those upon the tug is equal, is of greater weight. There is, therefore, a preponderance of evidence that the line slipped before the Couch grounded, although I must confess it is not free from doubt.

The only remaining question is whether the grounding of the Couch was in consequence of the slipping of the line. I think it quite evident from the position of the tow in the channel while passing the downward tow, and considering the great breadth and flatness of bottom of the Couch, that she was "smelling" the bank and tending toward it, notwithstanding the starboard helm, when the line slipped, and in the absence of evidence to the contrary, I think it fair to assume that if the line had not slipped the tug would have overcome that tendency and prevented the grounding. The grounding of the Couch must, therefore, be held to have occurred in consequence of the slipping of the line, and the fourth charge of fault is sustained.

The tug is, therefore, held in fault in two particulars: 1. In not so arranging the tow as to place the lightest draft vessel, the Atmosphere, first instead of last. 2. In permitting the line to slip. It is nowhere made to appear, neither is it claimed, that the Dobbin would have avoided the Couch, or the Atmosphere the Dobbin after the Couch had grounded. The tug must, therefore, be held liable for the damages caused by the collision.

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5. As to the tug's claim for towage services. The contract was to tow to Lake Huron. She towed the Dobbin to Port Huron, near the entrance to the lake. Here the Dobbin was obliged to stop and lay up for repairs. Ordinarily a contract to tow to Lake Huron would require that the tow should be taken into the waters of the lake; but, under the circumstances of this case it must be held that the contract was substantially performed.

The wind being favorable, the Atmosphere sailed up from the flats or a little above, but the tug was ready and willing to tow her up, if the Atmosphere had seen fit to avail herself of the tug's services. The Atmosphere can therefore claim no exemption from paying the full amount of the contract price.

The tug must, therefore, be allowed the contract price for towing in each case, viz: \$109 against the Dobbin, and \$81 against the Atmosphere, to be offset against the damages sustained by each.

Decrees accordingly.

THE UNION EXPRESS.

SEPTEMBER, 1874.

SALVAGE.—CONTRACT WITH OWNER OF CARGO.

Where a barge without small boat, provisions, sails or other means of propulsion, was adrift upon Lake St. Clair, although she had come to anchor, and the weather was good, *Held*, that she was in a situation to have salvage services rendered her, but that an adjustment of the same made by the owner of the cargo, was not binding upon the vessel.

THIS was a libel *in rem* by Alexander Tregent, owner of the tug Gem, for towage and salvage services, on the nights of June 17th and 18th, 1873.

On the 17th of June the barge took on a cargo of 250

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cords of slabs at Belle river, on Lake St. Clair, in the Province of Ontario, for transportation to Sandwich, on Detroit river, in the same Province, for one John Holgate. She had no sails or other means of propulsion of her own, and no small boat. After taking on her cargo, she broke loose from her moorings, and, with her crew on board, drifted out into the lake, what distance from shore did not appear, and finally came to anchor in about twelve feet water. The slabs constituting the cargo, belonged to one Mather, but Holgate, in whose name they were shipped, held a contract, in writing, by which Mather agreed to sell them to him for six shillings per cord, but to remain the property of Mather until paid for.

After the barge had gone adrift, and in the afternoon of the same day, Holgate, not then knowing the whereabouts or situation of the barge, except that she had gone adrift with her cargo on board, applied to libellant to send his tug Gem to her rescue, and bring her and cargo into Detroit, which libellant consented to do; and it was then agreed that the compensation for that service should be at the rate of \$7 per hour for the time necessarily spent, and that libellant should look to the cargo and barge for his security. The tug left Detroit on that service the same evening, and returned to Detroit with the barge and cargo between five and six o'clock the next morning. At just what hour the tug left Detroit did not clearly appear. All that appears is that it was "after tea," which would make the time of leaving probably six, or between six and seven o'clock. Although the night was dark, the tug had no difficulty in finding the barge; and after lying by her one or two hours, to give the men on her time to prepare and take supper from provisions furnished them from the tug, the barge having no provisions on board, she took the barge's line and proceeded at once to Detroit.

When the tug came up to the barge, her master, Moses Robarsh, who was also equitable owner, then on board of her, said to the master of the tug, he was glad he had come for them, and on being informed that the tug was at work by the hour, at once passed his line to the tug, and as soon as the

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men were ready, the journey to Detroit was at once commenced and carried to the end without further trouble or delay. It did not appear that Robarsh was informed of the rate of compensation agreed on, but only that the tug was at work by the hour.

Mather, the legal owner of the cargo, was with Holgate when the bargain for the tug was made, but whether he took any part in it or not did not appear; but it did appear that he was informed and knew of the terms agreed on.

After the barge was brought to Detroit, and on the same day, Holgate gave to the master of the tug an order or draft on John Pridgeon, to whom the cargo was soon after transferred, for \$98, being for 14 hours' services at \$7 per hour, but payment was refused.

Before this writ was brought, both vessel and cargo had been transferred to the said John Pridgeon, and he is the claimant in, and is defending this suit.

There was some testimony tending to show that Holgate was intoxicated so as to be incapacitated to do business when he made the bargain with libellant for the use of the tug, but not at the time he gave the order on Pridgeon. Some further facts in the case will appear in the opinion of the Court.

Messrs. *H. H. Swan* and *J. W. Finney*, for libellant.

Messrs. *Alfred Russell* and *S. Larned*, for respondent.

LONGYEAR, J. The first question that will be considered is, whether the service rendered by the tug was a salvage service. I think the barge and cargo were in a situation to have a salvage service rendered for them. They were adrift and utterly helpless, and night was coming on; and, although the barge came to anchor, she was in danger of being broken by any storm which might come on; the men were without provisions, and they had no small boat or other means of escape to the shore. It is true, there was no particular peril to the tug or her crew, nor any special difficulty or enterprise in the undertaking; but

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those considerations do not necessarily determine the character of the service as a salvage service or not; they bear more directly upon the *quantum* or measure of compensation to be allowed, where more has been agreed on. I hold, therefore, that, the service being a salvage service, libellant has a lien therefor on both vessel and cargo enforceable in this Court, independent of any effect that might be given to the contract between libellant and Holgate.

It is not important or necessary to consider whether Holgate's agreement with libellant was valid or invalid, or whether, if valid, it bound both vessel and cargo, or cargo only if either; because, as already seen, a lien exists upon both independently of it; and for the further reason that I am satisfied that \$7 per hour, the rate of compensation agreed on, is a fair and reasonable compensation on a *quantum meruit*. All that remains, therefore, is to determine the number of hours for which libellant is entitled to compensation.

It was concluded that the draft given by Holgate was evidence of a settlement and of an adjustment of the amount in controversy. While that is correct, it is equally true that it is *prima facie* only, and it is not even that as to the vessel, for Holgate was interested in the cargo only, and he had no power to bind the vessel in that manner. And, in addition, it appears by libellant's own testimony, that the data upon which Holgate made the adjustment were erroneous. He allowed the tug for 14 hours. The longest time that can be made by the testimony, is from 6 P. M. to 6 in the morning, which would be 12 hours. I think the most reasonable data, from the testimony, are 6½ P. M. to 5½ in the morning—eleven hours instead of fourteen as allowed by Holgate. The distance was only 18 or 19 miles, and notwithstanding the tug was obliged to run at a low rate of speed after she arrived in the vicinity where it might be expected the barge would be found, and also that she laid by the barge an hour or so waiting for the men to get supper, I think even eleven hours an unreasonable time. The only explanation of the extraordinary amount of time consumed is that, owing to some derangement of the

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tug's boiler, a sufficient amount of steam could not be made to enable her to make better time. But the time lost on that account must be held to be the loss of the tug, and therefore cannot be charged to the vessel and cargo, especially in the absence of all proof that the condition of the tug was known to the parties interested when she was engaged and her services accepted. I think nine hours a liberal allowance as to time, and libellant's recovery must be upon that basis.

9 hours' services at \$7 per hour	\$63 00
Int. June 18, '73, to date, Sept. 14, '74, at 7	
per cent.....	5 48

Making a total of.....\$68 48

For which amount libellant must have a decree, with costs.

Decree for libellant.

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SEPTEMBER, 1874.

SUPPLIES FURNISHED IN CANADA.—RIGHT OF ASSIGNEE TO SUE.

By the law of England previous to the statute of 3 and 4 Vict., no lien existed for supplies furnished domestic vessels.

Whether such lien existed with respect to foreign vessels, or whether the Court of Admiralty had jurisdiction to enforce it, seems never to have been settled prior to the passage of the Act of 3 and 4 Vict. This statute was, however, simply declaratory of the maritime law with respect to the existence of the lien as it was prior to its passage, and vested jurisdiction to enforce it in the Admiralty Courts.

Want of jurisdiction to enforce a lien in any particular locality is not fatal to the existence of the lien. The lien exists by virtue of the general maritime law—it follows the ship wherever she goes, and may be enforced wherever there is jurisdiction to enforce it.

There is a lien in Canada for supplies furnished an American vessel, and a Court of Admiralty has power to enforce this lien.

A lien for supplies is divested by an assignment of the claim.

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THIS was a libel *in rem* by James O'Leary for wood supplied the tug Champion by the libellant at Lampton, on St. Clair river, in the Province of Ontario, in October and November, 1871. The tug was a vessel of the United States, and owned and registered at Detroit, in this District.

The libellant was a citizen of Ontario and a subject of Great Britain.

Before the suit was brought, O'Leary had assigned his claim to Johnson & Co., brokers and bankers, of Port Huron, in this District, and the suit was brought at their instance and for their benefit.

The claim was evidenced by drafts drawn by the master of the tug upon the owner. After the suit had been commenced, and before the hearing, Johnson & Co. withdrew the drafts from the hands of their proctors, and, without further consultation or co-operation with them, made a settlement with and received payment from the owner of the tug, but not including costs, and without any reservation as to costs, and delivered up the drafts. The proctor's costs have not been paid. Libellant's proctors now ask for a decree for the same.

This is opposed on behalf of the owner of the tug, on three grounds :

First. That by the laws of the Province of Ontario, where the supplies were furnished, there was no maritime lien for the same ; and that therefore libellant had no right of action *in rem*, and the Court was without jurisdiction in the premises.

Second. That any lien which may have existed in favor of libellant ceased on the assignment of his claim to Johnson & Co.

Third. That in any event, the proctors having voluntarily delivered up to Johnson & Co. the evidences of claim, and thus enabled them to make a full and complete settlement with the owner, the proctors cannot now, without proof of collusion, look to the tug or her owner for their costs, but must look to Johnson & Co. alone.

Upon the question of lien, it is conceded that if a maritime

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lien for supplies had an existence in Ontario in any case, it had in this.

There are several other suits against the tug in behalf of Canadian parties, for supplies, depending substantially upon the same questions as the present case; and the decision in this case was to determine the others.

Mr. *L. S. Trowbridge*, for the libellant.

(1) The question of jurisdiction in cases of supplies furnished in Canada is conclusively settled in the case of *The Maggie Hammond* (9 Wall. 451). It is not a question of jurisdiction, but of comity. This case was followed by the Circuit Judge of this Circuit in that of *The Avon* (*ante*, p. 170).

(2) The question of assignment is not free from doubt. The authorities are conflicting, but upon principle the lien should be preserved. In other cases an assignment of the debt carries with it the security, as in case of indorsement of note secured by mortgage. Conceding the lien to be a personal right, why should it be lost by assignment? The want of power to assign by so much lessens the value of the lien (*The Boston*, Blatch. & How. 325; *The General Jackson*, 1 Sprague, 554; *The Wasp*, L. R. 1 Ad. & Ec. 367; *Sorley v. Brewer*, 1 Daly, 79).

In the following cases a mechanic's lien was held assignable: *Iaeger v. Bossieux* (15 Gratt. 98); *Tuttle v. Howe* (14 Minn. 145); *Goff v. Papin* (34 Mo. 180).

It is a general rule well settled that whatever rights of action survive to an executor are assignable (*The People v. Tioga Com. Pl.* 19 Wend. 73; *Sears v. Conover*, 34 Barb. 330; *Hoyt v. Thompson*, 1 Selden, 320).

Mr. *F. H. Canfield*, for claimant.

(1) This being a proceeding *in rem*, the jurisdiction depends upon the existence of a lien in favor of the libellant

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against the tug (*The Rock Island Bridge*, 6 Wall. 213; *Gardner v. The New Jersey*, 1 Pet. Ad. 223; *Harmer v. Bell*, 7 Moore, 267; 2 Pars. on Ship. 172 [n. 2], 322).

A maritime lien is defined in *The Young Mechanic* (2 Curtis, 412). If the debt in these cases created a lien, that lien existed and was in full force at the moment the supplies were placed on board the vessels while they lay in the Canadian port. If the liens did not exist then and there, they never existed (*The Two Ellens*, 1 Asp. Mar. Law Cases, 208-211).

This action being founded in contract, the existence of the lien depends upon the law of Canada—the *lex loci contractus* (Story Conf. of Laws, §§ 321, 322 b; *Whiston v. Stoddard*, 8 La. 95, 134; *The Avon*, ante, p. 170; *The Peerless*, Lush. 30). Whether there was a lien created depends upon the intention of the parties; they contracted with reference to the law of the place, and that law became part of the contract.

By the law of Canada no such thing as a maritime lien for supplies exists. It is not merely the want of a Court capable of enforcing it. The only expert sworn so testifies. The fact that no such lien exists is fully shown by the authorities. By the law of England no such lien existed till 1840 (*The Neptune*, 3 Knapp P. C. 84; Abbott on Shipping, 142-144, and cases cited; *The Two Ellens*, 1 Asp. Mar. Law Cases, 40, 208, 210). By virtue of the conquest, and subsequent Acts of the British Government, the law of England, as it then existed, became the law of Canada (1 Cooley's Blackstone, 108; *Baldwin v. Gibbon*, Stuart's Low. Can. p. 72; *Hamilton v. Fraser*, Ibid. 21; 1 Chitty's Com. Law, 638; *Blankard v. Galdy*, 4 Mod. 222; 16 Am. State Papers, 36; *Campbell v. Hall*, Cowp. 204; *Mitchell v. U. S.* 9 Pet. 748). The recent English statutes do not apply to Canada. The Act of Parliament under which the Government of Canada was organized, expressly provides that the English statutes shall not apply to the Canadas unless they are named or referred to by necessary intendment. These colonies have full power of local legislation upon this subject (1 Cooley's Black. 109; 7 and 8 William III). In 1791 Canada was divided, and in October, 1792, the Legis-

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on Shipping, p. 157; *The Rebecca*, 1 Ware, 191, 192; 3 Kent's Com. [8th ed.] 281; *The Phæbe*, 1 Ware, 268, 271; *The China*, 7 Wall. 68; *Dupont v. Vance*, 19 How. 171). The jurisdiction to enforce this lien was formerly denied in England, but in this country has always been admitted (*La Constancia*, 2 W. Rob. 487; *Briggs v. The Light Boats*, 11 Allen, 158; *The Siren*, 7 Wall. 152; *The Davis*, 10 Wall. 19; *The Maggie Hammond*, 9 Wall. 451; *The Jerusalem*, 2 Gall. 349; *The Bark Chusan*, 2 Story, 466).

(2) The contract of the master here is governed by the general maritime law, and not by the *lex loci* (*Pope v. Nickerson*, 3 Story, 477; Story's Conf. of Laws, § 286 b; *The Nelson*, 1 Hagg. 169, 175, 176).

(3) The Act of 3 and 4 Vict. ch. 65, enlarging admiralty jurisdiction, extends to the colonies, though not named, and impliedly repeals the statute of 1792 (*The Wataga*, Swabey, 165).

LONGYEAR, J. The argument of respondent's advocate in support of the first ground of defense—that there was no lien by the *lex loci contractus*, and therefore no right of action *in rem* in this Court—is based upon the following propositions:

First. That the laws of France which prevailed in Canada at the time of its conquest by England, and by which there was a lien for necessities supplied to a ship, had been superseded by the laws of England.

Second. That a lien for necessities supplied to a ship, whether domestic or foreign, never had an existence in England until it was created by Act of Parliament.

Third. That the Act of 3 and 4 Victoria, ch. 65, sec. 6 (in 1840), creating a lien in such cases, had no operation in Upper Canada, now Province of Ontario, because not so expressly named and provided.

Fourth. That such was the state of the law in the Province of Ontario in October and November, 1871, when the cause of action in this case arose.

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The arguments were confined to these propositions, and were conducted on both sides with commendable zeal and ability, and elaborate research. I have also received much aid from an instructive brief of Messrs. H. H. Swan and J. W. Finney, proctors and advocates for libellants in another suit now under advisement, and in which this same question is involved.

It will be seen that the second proposition lies at the foundation of the entire argument; because it is only by maintaining it that the others are of any consequence. The second proposition will therefore be first considered. In considering this proposition, it must be borne in mind that the Champion was a vessel of the United States, and therefore foreign to the place where the necessities were supplied.

It is too well settled and understood to need citation of authorities or admit of discussion, that, as to domestic vessels, jurisdiction to enforce the lien accorded by the maritime law to material-men, by action *in rem* in the admiralty or elsewhere, was long since overthrown and denied in England, and the lien itself held never to have had any existence there. Such has hitherto always been the rule in the United States also, where the maritime law was at first adopted as it was administered in England, together with all its inconsistencies and incongruities as applied to the condition of things here. The incongruity of limiting the jurisdiction to tide water has already been abandoned, and has ceased to mar the harmony of the system; and, judging from the recent amendment of Admiralty Rule 12 by the Supreme Court, and certain foreshadowings by recent enunciations from the bench of that Court, and to which may be added a recent decision by the District Court for the Eastern District of Missouri, it is evident that *this other* is about to meet the same fate (*Wilson v. Bell*, 6 Chic. Leg. News, 261; *The Commonwealth*, 20 Int. Rev. Rec. 64; s. o. 6 Chic. Leg. News, 334).

But it is by no means so well settled, although seemingly so understood, that the denial of jurisdiction in the admiralty to enforce liens of material-men extended to necessities sup-

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plied in England to *foreign vessels*, and much less so in regard to the *existence* of the lien in such cases. It is true it seems to be assumed by Mr. Abbott, in his excellent work on Shipping (pages 142 to 150), and it was no doubt held by the Court of King's Bench, that the denial went to that extent, both as to the jurisdiction and the existence of the lien. To my mind, however, it is apparent from the notes to those pages of Abbott, and the cases there cited and commented on, in both text and notes, that the controversy in this respect between the admiralty and common law Courts of England, never was entirely settled and determined, the one way or the other; that, in fact, that controversy continued as to foreign vessels, until it was finally disposed of and determined in favor of the admiralty, by the statute of 3 and 4 Vict. *supra*. The High Court of Admiralty did not understand the denial to have gone to the extent claimed, certainly as late as 1834. In that year, in the case of *The Neptune* (3 Hagg. 129-140, 8 Eng. Adm.), Sir John Nicholl, delivering the opinion of the Court, says: "In England, then, the law of nations, of which the *lex mercatoria* is a branch, forms part of the common law, unless it be altered or controlled by Parliament or the Municipal Courts. It is clear that, by the civil law, and by the general law of other nations, when uncontrolled, persons who have furnished materials for the fitting out of a ship, have a lien upon the ship itself, and, if so, upon the proceeds of the ship. If an English ship were repaired in France or in Holland, material-men might there arrest and enforce payment against the ship itself. How far a foreign ship repaired here might not be subject to the same right is a question into which it is not necessary now to inquire, for the Neptune is a British ship, and in such case the Municipal Courts of this country have so far departed from the rule of the civil law that they have held that the lien does not extend to the ship itself; and so far, therefore, this Court is restrained; but they have not gone further." It is true *The Neptune*; being a domestic ship, and the repairs having been done in England, and the application in that case being to participate in surplus proceeds,

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and not a proceeding against the ship itself, the point thus discussed was not directly involved; but what was said none the less shows that, in the opinion of Sir John Nicholl at least, the question of lien for necessities supplied to a foreign vessel in England had not then passed beyond controversy in her Courts.

The judgment in that case was afterwards reversed by the Privy Council (2 Knapp's Cases, 84), on the ground that it allowed a party to participate in proceeds who had no lien upon the vessel itself. It became a leading case, and was deemed a final determination of the question of lien for necessities supplied in England, so far as it related to domestic ships.

The statute of 3 and 4 Vict. (*supra*) must be regarded, I think, as declaratory, or at least as a recognition merely, of what the maritime law then was, so far as concerned the question of lien for necessities supplied to a foreign ship, whether within the body of a county or upon the high seas, and not as introducing a new principle into English jurisprudence. This, I think, is abundantly evident from the language of the enactment itself, which is as follows: "The High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature of salvage for services rendered to or damage received by any ship or sea-going vessel, or in the nature of towage, or for necessities supplied to any foreign ship or sea-going vessel, and to enforce payment thereof, whether such ship or vessel may have been within the body of the county, or upon the high seas, at the time when the services were rendered or damage received or necessities furnished in respect of which such claim is made" (Abb. on Ship. 150). It will be noticed that the Act does not purport to *create* a lien. It leaves that question just where it stood before, and, of course, to be determined by the maritime law. It seems to assume the existence of the lien, and then simply restores to the admiralty a jurisdiction in relation to it, of which it had been deprived by the Municipal Courts. That this is the light in which that Act was regarded by the High Court of

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Admiralty is evident by the subsequent decision of that Court in at least two cases—one, *The Alexander* (1 W. Rob. 288), soon after the Act went into operation; and the other, *The Wataga* (Swab. 165), at a later period (1856), holding that the jurisdiction conferred by the Act extended to claims for necessities supplied to a foreign vessel in colonial as well as in British ports.

In the case of *The Alexander* the libel was *in rem* against a Norwegian ship, for necessities supplied to her in England in 1835, five years before the Act went into operation. The jurisdiction of the Court was contested on the ground that the Act did not affect past claims; but the Court held the contrary, and maintained the jurisdiction. In the course of the opinion (p. 294), Dr. Lushington said: "Now the action in the case is brought in virtue of the particular statute recently enacted, and without that statute the Court would not have been justified in entertaining the suit at all; for, although the subject-matter clearly falls within the original scope of the maritime law, before the passing of the statute, the Court might have been prohibited from proceeding in the cause, on the ground that the common law had narrowed the general jurisdiction originally belonging to this Court. Such prohibition is now taken off by the statute; but looking to the words of the Act, I do not find any expressions limiting the jurisdiction of the Court to cases accruing subsequent to the period when the Act came into operation." The learned doctor treated the statute simply as an act of delivery of the admiralty from the thralldom in which it had been held by the common law courts; and he maintained the jurisdiction, not because the statute created a lien, or that the claim or cause of action had any foundation in it, but because the lien, claim, and cause of action clearly fell "within the original scope of the maritime law," and had their foundation in *it*. I consider the learned doctor's position entirely sound, and am not aware that its soundness has ever been questioned.

In the case of the *Wataga*, the application was for payment out of the proceeds of an American ship for necessities sup-

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plied to her in 1856, at the Cape of Good Hope, a British possession—the case being, in its incidents, almost identical with the one now under consideration. The application was opposed on the ground that the statute of 3 and 4 Vict. ch. 65, sec. 6, was not intended to apply to the case of necessities supplied to a foreign ship in a port at a distance from England, though a British possession. But Dr. Lushington, by whom this case was also decided, held otherwise, and maintained the jurisdiction. The decision in that case would maintain the jurisdiction in this in that same Court. At the close of the opinion (p. 167), and after quite fully discussing the object and purposes of this Act, he throws out the following significant intimation: “This claim must be maintained; but I am by no means clear, even if I am mistaken on the point of colonial ports, that it could not be supported under the narrower interpretation.”

The High Court of Admiralty seems in fact never to have relinquished its claim, that under the general maritime law there was a lien for supplies, whether to domestic or foreign vessels, or whether within the body of a country or upon the high seas, only so that they were necessary and were furnished upon the credit of the ship. It simply surrendered to the superior jurisdiction and powers of the common law Courts, and ceased to exercise the jurisdiction to enforce the lien. When Parliament in part took off the prohibition imposed by the common law Courts, by the statute of 3 and 4 Vict., the High Court of Admiralty to that extent simply resumed that which it had all along claimed as its right, and proceeded at once to enforce a lien which it assumed, and no doubt rightfully, had simply been in abeyance.

That the lien for necessities supplied to a ship, recognized by the general maritime law, always existed in England as to foreign ships, before as well as after the Act of 3 and 4 Vict., was assumed by our Courts from the earliest period of the exercise of admiralty jurisdiction here, for while adopting in the main, the admiralty jurisprudence of England as there exercised, the Supreme Court of the United States from the beginning assumed and fully recognized the existence of the

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maritime lien for necessities supplied to a foreign ship in all cases, and the jurisdiction of the Federal Admiralty Courts to enforce it (see General Admiralty Rule 12). This rule, from the beginning, and all through its various modifications by amendments or otherwise, has always assumed the existence of the lien, and provided for its enforcement. This has always been true of it as to foreign ships, and recently it has been so amended as to drop all distinction in that regard.

Maritime liens for necessities supplied in England to a foreign ship, I am satisfied, have always had an existence there. Jurisdiction to enforce them was alone prohibited. It is well settled, however, that want of jurisdiction to enforce a lien in any particular locality is not fatal to the existence of the lien itself. The lien exists by virtue of the maritime law, and it follows the ship wherever she goes, and may be enforced wherever there is a jurisdiction to enforce it (*The Maggie Hammond*, 9 Wall. 435, 451; *The Avon*, ante, p. 170). And this applies as well to the objection that there is no jurisdiction to enforce a maritime lien in the Province of Ontario, where the cause of action arose.

The question of lien in this case, therefore, in the absence of any positive enactment to the contrary, must be determined by the general maritime law, and by that law there was a lien, and also jurisdiction in this Court to enforce it.

No objection was made that the necessities in question were not supplied upon the *high seas*, or upon *tide water*, as those terms are understood in English admiralty jurisprudence, and that therefore there could be no lien; it is therefore unnecessary to consider it.

The omission of learned counsel to make that objection was undoubtedly for the very good reason that since the decision of the United States Supreme Court in the case of *The Eagle* (8 Wall. 15), and of the United States Circuit Court for the Northern District of Ohio, by Emmons, Circuit Judge, in the case of *The Avon* (ante, p. 170), that objection has no longer any force in our Courts. This may be said to be especially so under the authority of the Supreme Court in the case of *The Eagle* (*supra*), in a case like the present, arising upon the great

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boundary waters between this country and British North America, constituting as they do great national thoroughfares, international in their character, and common to the vessels of both countries.

There are many decisions of the Admiralty Courts of the United States which have a bearing upon the questions presented by the defense here under consideration; but it would serve no useful purpose to enter into an analysis of them here. A few of the leading ones, as far as I have taken the time to examine them, are, however, here cited: *The Eagle* (8 Wall. 15); *The Maggie Hammond* (9 Ib. 435, 451); *The Aron* (*ante*, p. 170); *The Rebecca* (Ware, 191, 192); *The Phoebe* (Ware, 267, 268, 271); *Dupont v. Vance* (19 How. 171); *The Boston* (Bl. & Howl. 325); *The Siren* (7 Wall. 156, 158); *The Jerusalem* (2 Gall. 349); *The Chusan* (2 Story, 466); *Pope v. Nickerson* (3 Story, 477); see, also, Abb. on Ship. 142 to 150; 2 Kent's Com. 8th ed. 281; 2 Pars. on Ship. & Adm. 322; Story Confl. of Laws, § 286 c.

The second proposition of the argument in support of the first ground of defense, viz., that there was no lien, and therefore no right of action *in rem* in this case, is not sustained; and with that the whole superstructure of the argument in support of that defense falls.

2d. The lien and jurisdiction to enforce it being maintained in favor of the original creditor, was the lien divested by the assignment of the claim?

Upon authority, I am clear that this question must be answered in the affirmative. It has been so held in every case in the Federal Admiralty Courts to which my attention has been called, in which the discussion was not evidently influenced by special circumstances.

In the case of *The Patchin* (12 Law Rep. 21), Judge Conkling, in a well-reasoned opinion, so held in regard to mariners' wages. He notices a distinction between liens for wages and upon bottomry bonds and bills of lading, which are assignable, on the grounds that the bond is an express hypothecation, and binds the ship to the lender and his assigns; and

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that the bill of lading is negotiable, made so by law for the benefit of trade, and its transfer carries with it the title to the goods shipped, and of course the right to maintain a suit upon it in case of their loss; while, on the contrary, the right of the mariner to proceed against the ship *in specie*, is conferred upon him for his own exclusive benefit, and arises by implication merely. He held that liens of the latter character are strictly personal. He recognizes that the claim or debt may be lawfully transferred, but holds that the lien does not follow.

: In the case of *Reppert v. Robinson* (Taney's Decisions, 492, 498-9), the libel was *in personam* for repairs and supplies. In delivering his opinion, Ch. J. Taney said: "But if it appeared upon the proceedings that when the suit was brought Hamilton held this due bill as assignee, and the proceedings were instituted for his benefit, I do not think the admiralty jurisdiction could have been maintained; the right to sue in admiralty upon claims of this description is personal, and is maintained upon principles and for reasons which do not apply to the assignee." Certainly if no jurisdiction *in personam*, there can be none *in rem*.

In the case of *The Geo. Nicholas* (Newb. 449, 454 to 457), the libel was *in rem* for salvage, and Judge McCaleb held that the same rule applies to liens for salvage as to those for wages, and that they are not assignable, citing, with approbation, Judge Conkling's opinion in *The Patchin* (*supra*).

In the cases of *The Æolian* (1 Bond, 267), and *The Freestone* (2 Bond, 234, 242), the libels were *in rem* for wages, and Judge Leavitt held the same as Judge Conkling in the *Patchin* and Judge McCaleb in the *Freestone*.

These are all the cases in the Federal Admiralty Courts in which this doctrine has been maintained, to which my attention has been called, or that have fallen under my notice. There are, however, several cases in State Courts, arising mostly under State statutes, conferring liens where none existed by the maritime law, and in favor of mechanics and others, in which the same doctrine has been held (*Piersons v. Tincker*, 36 Me.

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384, 386; *Hays v. Steamboat Columbus*, 23 Mo. 233; *Lovett v. Brown*, 40 N. H. 511; *Steamboat White v. Levy*, 5 Eng. [Ark.] 411).

The cases in the Federal Admiralty Courts which seem to hold the opposite doctrine will now be considered.

In the case of *The Boston* (Blatchf. & Howl. 325), the libel was *in rem* for repairs, and Judge Betts held that an assignee of the debt for a full consideration, who became such *at the express instance of the master*, was entitled to all the legal remedies possessed by the original creditors, including the right to proceed against the vessel. There can be no doubt that the fact that the transfer was made at the express instance of the master, had its influence, although it is not so stated in the opinion. At all events, it affords a reasonable explanation for the difference of opinion between the learned judge and the others whose opinions have been cited.

In the case of *The General Jackson* (1 Sprague, 554) the libel was *in rem* for supplies, and Judge Sprague held that "the assignment of the claim, as security for a debt which has since been paid, would not of itself be a waiver of the lien." What his opinion would have been if the assignment had been absolute instead of for security merely, the case does not inform us.

These are all the cases in the Federal Admiralty Courts to which my attention has been called, or which have fallen under my notice, which even seem to hold that the lien is not divested by the assignment of the debt; and as to each of these cases it is to be observed that the decision was evidently influenced by special considerations.

As on the other side of the question, so here there are also several State decisions, based in like manner on State statutes, holding the same way as the judgments last cited (*Hoyt v. Thompson*, 5 N. Y. [1 Seld.] 320, 327; *Sears v. Conover*, 34 Barb. 330; *Sorley v. Brewer*, 1 Daly, 79; *Iaeger v. Brossieux*, 15 Gratt. 83, 88; *Goff v. Papin*, 32 Mo. 180; *Tuttle v. Howe*, 14 Minn. 145).

It is seen, therefore, that the decisions of our own Admi-

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ralty Courts upon this question are substantially all one way; and they fully sustain the position that the lien which a material-man has is strictly personal to himself, and does not pass to his assignee; that it is, in fact, extinguished by the assignment of his claim, so that neither he nor his assignee can come into a Court of Admiralty for its enforcement. I have not the time to devote to a discussion of the soundness of those decisions. It has, however, been so fully done by the learned judges in the opinions I have cited that there really does not appear to be much left to be said upon the subject. Even if I doubted the soundness of those decisions, I should hesitate long before venturing an opinion in opposition to so formidable an array of experience, learning and ability. At all events, I should not do so except for cogent and conclusive reasons. Until overruled by higher authority, the rule of those cases will be the rule of decision in this Court.

In England the question does not seem to have been much discussed as applied to maritime liens; at all events not sufficiently to have established a rule upon the subject. See Cross on Liens, 48 (18 Law Lib.) as to assignments of liens in general, and *The Wasp* (L. R. 1 Ad. & Ec. 367), as to assignments of maritime liens.

The proofs in this case showed that before this suit was brought, libellant had sold and transferred his claim to Johnson & Co., and that the suit was instituted by them, in libellant's name, but for their benefit. The lien was thereby lost, and the suit cannot be maintained.

In this view of the case a consideration and decision of respondents' third ground of defense has become unnecessary.

Libel dismissed.

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SEPTEMBER, 1874.

LIEN FOR MONEY ADVANCED ON REQUEST OF OWNER.—NECESSARIES
FURNISHED IN HOME PORT.

A maritime lien exists for moneys advanced to purchase or pay for necessities supplied to a ship wherever it would exist for the necessities themselves.

Such lien exists for necessities furnished upon request of the owner wherever it is shown affirmatively they were furnished on the credit of the vessel.

Where money was advanced by one who held the legal title to the vessel under a bill of sale given to him as security for the indorsement of a note which had been paid by the maker and the bill of sale thereby extinguished; *Held*, the lien was not thereby defeated.

Where, however, libellant was jointly interested with the equitable owner in the profits of one trip, *Held*, he could not recover for advances made during that trip.

Parties may stipulate for a lien for necessities, notwithstanding that no such lien is implied by the law of the place where such necessities are furnished.

By the general maritime law a lien exists for necessities furnished a domestic vessel, even though by the law of the place there may be no jurisdiction to enforce it.

THIS was a libel *in rem* brought by John H. Eakin against the barge Union Express, a Canadian vessel, for moneys advanced by him to procure and pay for necessities supplied to the barge, partly at Detroit, in this State and district, and partly at Windsor, in the province of Ontario, the home port of the vessel.

The facts appear, so far as necessary, in the opinion of the Court.

Messrs. *J. W. Finney* and *H. H. Swan*, for libellant.

(1) Money advanced for the purchase of supplies constitutes a lien upon the vessel, equally with the supplies and re-

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pairs furnished directly to the vessel (*Thomas v. Osborn*, 19 How. 28; *The Lulu*, 10 Wall. 203; *The Grapeshot*, 9 Wall. 141; *The Emily B. Souder*, 3 Ben. 159; *The Kalorama*, 10 Wall. 204).

(2) Libellant is not deprived of his lien by the fact that the advances were made to the owner, since credit was not given to him (*The Guy*, 9 Wall. 758; *The Kalorama*, 10 Wall. 213).

(3) This lien exists for advances made in Canada (see brief in preceding case).

Mr. *Alfred Russell*, for claimant.

(1) Granting that Eakin was not the owner, but that Robarsh was, we say that no lien is implied from contracts made by the owner in person (Conk. Adm. 7, 59; *The St. Jago de Cuba*, 9 Wheat. 416, 417; *Beldon v. Campbell*, 6 E. L. & E. 473; *Pratt v. Reed*, 19 How. 361; *The Sophie*, 1 W. Rob. 369; *Thomas v. Osborn*, 19 How. 29, 38, 40, 43).

(2) A person who loans money to be used in repairing a vessel is not a material-man, and can have no lien upon the vessel (*Lawson v. Higgins*, 1 Mich. 225; 2 Pars. on Ship. 148, n. 4).

(3) Credit given to the builder or owner creates no lien (*The Abby Whitman*, 17 Law Rep. 322).

(4) For all advances on this side the river libellant took notes of Robarsh, which are not produced or surrendered to be canceled (2 Pars. on Ship. 153, n. 1).

(5) Charges for telegrams are not liens (*The Jos. Cunard*, Olcott, 120). As to the necessity which will give a lien for borrowed money, see *The Rainbow* (Bee, 117); *The Perseverance* (1 Blatch. & How. 388); *The Maitland* (2 Biss. 201).

LONGYEAR, J. The position of respondent's advocates, that there is no lien by the maritime law for moneys advanced to purchase or pay for necessaries supplied to a ship

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in any case, has been fully disposed of against the proposition by numerous decisions of the Supreme Court; and it may be regarded as well settled law, that a maritime lien exists for such advances, in all cases where it existed for the necessities themselves (*Thomas v. Osborne*, 19 How. 22, 28). In this case, Mr. Justice Curtis, delivering the opinion of the Court, says: "It is not material whether the hypothecation is made directly to the furnishers of repairs and supplies, or to one who lends money on the credit of the vessel, in a case of necessity, to pay such furnishers." And since that decision, the same doctrine has been frequently reiterated and applied by that Court, down to a very recent period (*The Grapeshot*, 9 Wall. 129, 141; *The Lulu*, 10 Wall. 192, 203; *The Emily B. Souder*, 3 Ben. 159; s. c. 8 Blatch. 337).

The position of respondent's advocates that no lien arises or is implied for necessities supplied on request of the owner, has also been fully settled against the proposition by the same high authority; and it is settled law that a lien may arise or be applied as well in such a case as where they were supplied on request of the master, in the absence of the owner, the only difference being that where supplied on request of the owner, the facts that the supplies were necessary and that they were furnished on the credit of the vessel as well as of the owner, must be made to appear, while in the other case those facts are presumed (*The Guy*, 9 Wall. 758; *The Kalorama*, 10 Wall. 204, 213). In the case of *The Kalorama*, the Court say: "Implied liens, it is said, can be created only by the master; but if it is meant by that proposition that the owner or owners, if more than one, cannot order repairs and supplies on the credit of the vessel, the Court cannot assent to the proposition, as the practice is constantly otherwise." "Undoubtedly," say the Court, "the presence of the owner defeats the implied authority of the master, but the presence of the owner would not destroy such credit as is necessary to furnish food to the mariners, and save the vessel and cargo from the peril of the seas." "More stringent rules," they say, "apply as between one part owner and another, but the case is free

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from all difficulty if all the owners are present, and the advances are made at their request or by their direction, and made on agreement, express or implied, that the same are made on the credit of the vessel." (See, also, *The Commonwealth* [Eastern District of Missouri], 20 Int. Rev. Rec. 64.)

In the present case, the proofs showed the following facts: That the repairs, materials, &c., to pay for which libellant's advances were made, with two or three unimportant exceptions, were necessary to enable the barge to prosecute her business; that Robarsh, the person on whose request the advances were made, was the equitable owner as well as master, during the whole time the advances were being made, although the legal title was in another person; that Robarsh was utterly irresponsible and without credit; that libellant made the advances on the express understanding and agreement with Robarsh that he should have a lien on the barge therefor, and the advances were accordingly charged by libellant, upon his books, directly to the barge, by name. Here are all the elements combined necessary to create a lien (see authorities above cited).

It was claimed that libellant held the legal title of the vessel, as security, by a bill of sale or mortgage, and it was contended that therefore any lien he may have was not a maritime lien, enforceable in this Court. The facts in that regard are as follows: Previous to the transactions here in question, Eakin had indorsed Robarsh's note for \$150, and to secure himself had taken a bill of sale of the barge from one Shipley, in whom the legal title then stood. The note was afterwards paid with Robarsh's money, and Eakin never became liable or suffered any loss on account of the transaction. Afterwards, when the advances here in question were in contemplation, Eakin refused to make them on Robarsh's personal responsibility, and it was agreed that he should have a lien upon the barge for the same. The bill of sale, although extinguished by the payment of the \$150 note, still remained in Eakin's possession, and Robarsh indorsed upon it a sort of release to Eakin of all his interest, right and title in and to the barge, both parties sup-

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posing and intending that the Shipley bill of sale was thereby made a continuing security to Eakin; and so matters remained during the whole time the advances were being made. After the advances had all been made, Robarsh, without the knowledge or consent of Eakin, sold the barge, and caused her to be duly and legally conveyed to John Pridgeon, claimant and respondent in this suit, and he claims to own the barge free and clear of any lien whatever in favor of Eakin. The grounds upon which this claim is based are: 1. That by virtue of the bill of sale from Shipley to Eakin, the latter was legal owner of the barge while the advances were being made, and no lien could accrue to the owner; or, 2. If not owner, he was at least a mortgagee for security of the advances, and his only remedy is by foreclosure of his mortgage, which cannot be accomplished in this suit or Court.

In the first place, the bill of sale being for security merely, it was extinguished and ceased to be of any force or effect whatever by the payment of the note to secure which it was given; and, in the second place, it was not in Robarsh's power to revive it or confer upon Eakin any right or title under it, as mortgagee or otherwise, without the co-operation and deed of the person who held the legal title. The transaction, however, makes it evident that it was the understanding between Robarsh and Eakin that the advances in question were made by the latter on the credit of the barge, and so it supports Eakin's claim to a maritime lien, and a right of action *in rem* in this Court (*The Kalorama*, 10 Wall. 213, 214). As master and equitable owner, it was competent for Robarsh to bind the vessel to that extent, but he could convey no legal title by way of mortgage or otherwise, because he had none himself.

The proofs show that during a portion of the time the advances were being made, Eakin was jointly interested with Robarsh in the operations of the barge. The joint interest, however, extended to only one trip and cargo. The items of libellant's claim arising out of that joint transaction amount in the aggregate to \$136 23. This amount was withdrawn by libellant at the hearing, and must be deducted from libellant's

claim. The amount so withdrawn includes an item for tonnage duties, and nearly all the items for telegrams embraced in libellant's account, and on account of which it was claimed no lien could arise; and it also includes the only item for which Robarsh's note was taken by Eakin, and not delivered up at the hearing, and therefore the questions raised as to all those items have become immaterial. A few items of the same character, mostly for telegrams, remain in the account, but they are insignificant in amount, and although standing alone, they would probably create no lien, yet they seem to have been intimately connected with transactions for which there is a lien, and they will not be rejected.

A portion of the supplies for which libellant made advances, amounting in the aggregate to \$98 50, were furnished at Windsor, opposite Detroit, and in the Province of Ontario, and while the barge was at that port. Windsor was the home port of the barge at the time, and it is contended that as to this amount at least libellant had no lien, for the reason that none exists in such cases by the maritime law as administered in England, and that the laws of England were the laws of Ontario; and the argument is, there being no liens for the supplies themselves, there could be none for advances made to pay for them. The conclusion stated undoubtedly follows from the premise stated; but I think the premise cannot be maintained, for two reasons: 1. It was expressly agreed between Eakin and Robarsh, who, as we have seen, was entirely competent to make the agreement so as to bind the vessel, that Eakin should have a lien upon the barge for all advances made by him to pay for supplies, without any exception or limitation as to the place or places where the supplies themselves should be furnished or the advances should be made. 2. By the general maritime law there is a lien for necessities supplied to a domestic as well as a foreign ship, the only difference being that, in regard to a domestic ship, the necessity and the fact that the supplies were furnished on the credit of the ship must be proven, while, in regard to a foreign ship, those matters are presumed (see authorities before cited, and especially *The Commonwealth*, 20

Int. Rev. Rec. 64). This lien in fact exists in places subject to the laws of England, notwithstanding the jurisdiction to enforce it there is denied (*The Champion*, decided by this Court at the present term). And since the recent amendment of General Admiralty Rule 12, the general maritime law prevails in and is administered by the Admiralty Courts of the United States in regard to liens for supplies in a domestic as well as in a foreign port; and this, notwithstanding there may be no jurisdiction to enforce them in the locality where the supplies were furnished (*The Maggie Hammond*, 9 Wall. 435, 481, 482; *The Commonwealth* and *The Champion*, *supra*).

It is true, in cases where the parties, the vessel and the place of the contract or port are all foreign, the entertainment of jurisdiction by our Courts in any case is a matter of comity, and not a matter of right; and where in such case they are all subjects of the same foreign country, and in which there is no jurisdiction to enforce such liens, and citizens of the United States could not have the same remedies there as are accorded to such foreigners here, our Courts will not in general entertain the jurisdiction, but they may do so in their discretion (*The Maggie Hammond*, *supra*).

In the present case the libellant is described in the libel as a citizen of Detroit, in this District, and no issue was made as to that allegation. The claimant is also a citizen of the United States. From what has been said, it results that the objection to the allowance of a lien for the advances made to pay for necessities supplied in the Province of Ontario is not well taken.

Four items of credit were claimed—one of \$300, one of \$21, one of \$50, and one of \$84 68. The item of \$300 was satisfactorily shown to have been entered by the book-keeper by mistake, and cannot be allowed. The item of \$50 related to the joint adventure, and must be rejected with the account relating to that matter. The remaining items, amounting to \$105 68, must be allowed.

The whole amount of advances made by libellant, after deducting the amount arising out of the joint adventure, is \$637 17, as proven. Deducting the credits allowed, the bal-

The Senator.

ance in favor of libellant is \$531 89, on which amount interest must be allowed at seven per centum per annum for one year and nine months, that being a fair average of the time the advances have run.

Balance of debt.....\$531 89

Int., 1 year and 9 months, at 7 per cent. 65 16

Making a total of.....\$597 05

For which libellant must have a decree, with costs.

Decree accordingly.

THE SENATOR.

FEBRUARY, 1875.

TOWAGE.—MASTER'S CERTIFICATE.—DURESS.—POWER OF UNDERWRITER OF CARGO TO BIND VESSEL.

A master's certificate as to the amount agreed to be paid for services will not be set aside, unless it appear clearly and satisfactorily that the sum named is so unreasonable as to raise a suspicion of fraud.

The making of such certificate under a threat to attach the vessel is not such duress as will avoid its effect.

The underwriter, where there is no abandonment, has no authority to direct the master, or to contract for the vessel.

JAMES MOFFAT and Alonzo N. Moffat libelled the schooner Senator upon a claim and account certified by her master as correct, for \$400, for towage services August 14th, 1873. The defenses set up will appear in the opinion of the Court.

Mr. *H. B. Brown*, for libellants.

Mr. *W. A. Moore*, for claimant.

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LONGYEAR, J. It is conceded that the master's certificate was within the scope of his authority as master, and if made voluntarily and without coercion it was binding on the vessel and owners. But it was contended that it was made under coercion and not voluntarily.

The only coercion pretended was that testified to by the master, viz: A threat by libellants to libel and attach the vessel in the Eastern District of Michigan, where she then was, if he refused to sign the certificate; and that he signed it in consequence of such threat in order to avoid being detained and delayed in the completion of the voyage then in progress. Libellants testified that no such threat was made; but, if it was made, it was simply to take a strictly legal step to litigate the matter in controversy, which was, not whether anything was due libellants, but how much; and the making of the certificate by the master was simply the exercise of a choice on his part, to submit to what he was not willing to concede to be right, rather than take the risks and incur the trouble, delay and expense of a law suit. Such settlements are of frequent occurrence in business matters, and are always upheld when untainted by fraud, mistake or unfair dealing, as in this case (*Wilcox v. Howland*, 23 Pick. 167; *Waller v. Crolle*, 8 B. Mon. 11; *Eddy v. Herrin*, 17 Me. 338; *Alexander v. Pierce*, 10 N. H. 494).

Another ground urged for setting aside the certificate was, that the amount was grossly exorbitant for the service rendered. In order to defeat the certificate on this ground it was necessary to make it appear clearly and satisfactorily that the amount allowed was so unreasonable as to raise a presumption, or suspicion at least, that the certificate was fraudulently or maliciously made (2 Pars. Ship. & Ad. 10). Have we here such a case made out? The service had already been rendered and the dispute was as to how much it was worth. The amount certified by the master was \$400, and the estimates of the witnesses ranged all the way from \$500 down to \$75. This certainly fails to make out such a case as was necessary, under the rule above laid down, to set aside a settlement deliberately made.

The Senator.

Another ground urged was that the matter had been referred for settlement to one Guyle, an agent for the underwriters on the cargo, and he had instructed the master to pay no more than \$50. In the first place, this is not consistent with the concession of the master's authority in the premises, already alluded to. In the next place, there is no proof of any such reference. There is some proof that Guyle was somewhat consulted in the matter, but none that it was referred to him for settlement, either formally or informally. In the next place, Guyle had no authority simply by virtue of his agency for the underwriters to direct the master what to do or what not to do in the premises, there having been no abandonment to and of course no acceptance by the underwriters. Insurers are mere strangers, and are not entitled to be heard under such circumstances (*The Packet*, 3 Mason, 255, 258; *United Ins. Co. v. Scott*, 1 Johns. 106; see, also, *The Boston*, 1 Sum. 328, 332). And finally, even if Guyle had any authority in the premises, it extended to the cargo only, and this suit is against the vessel alone.

It results that libellants must have a decree for the bill as certified, with interest from date, and costs of suit.

Decree for libellants.

THE MAGNET.

FEBRUARY, 1875.

WAGES.—FORFEITURE FOR DESERTION AND MISCONDUCT.

Where a seaman employed upon a steamboat by the month, left before the expiration of the month he was then serving, *Held*, his entire unpaid wages were forfeited.

Where the second engineer is employed by the first engineer, the latter has a right to discharge him for good cause, without, and even against, the consent of the master.

Where an engineer wilfully deranged his engine, in order to compel the boat to stop at a certain port at which he desired to leave, it was held such misconduct as worked a forfeiture of wages.

THE libel was filed by John B. Howard for a balance due him as wages for services as first engineer on the steamer during a portion of the navigation season of 1871. The balance claimed to be due was \$175. The defense was desertion and improper conduct, which more fully appears in the following opinion.

Mr. *H. B. Brown*, for libellant.

Mr. *W. A. Moore*, for claimant.

LONGYEAR, J. The law of this case was determined by this Court in the case of *The John Martin* (2 Abb. U. S. 172). It only remains to determine whether, under the law, the proofs make out a case of desertion and forfeiture of wages.

That libellant left without the consent of the master, and with the intention not to return, was fully proven, and was not disputed. The only questions therefore are, whether he had the right to leave when he did, under his contract; and if not, then whether he had just cause for leaving.

At the hearing there was some dispute whether the hiring of libellant was expressly for the entire season of navigation, or by the month simply, without any express understanding as to the term of service. I think the latter is sustained by the proofs; but it is of no great importance which it was, because it was clearly proven and was undisputed that libellant left before the expiration of the month upon which he had then entered. This, as was decided by this Court in the case of *The John Martin* (*supra*), was a leaving before the term of service agreed on had expired. Libellant, therefore, had no right to leave when he did, under his contract.

Had libellant just cause for leaving? The only cause urged or pretended was that he was dissatisfied with his second engineer on account, as alleged, of his habitual drunkenness, and that the master refused to discharge him. The proofs show that libellant as first engineer, had the right to employ his second, and that he actually exercised that right in the employment of the second engineer, in regard to whom the above mentioned complaint was made. This carried with it and vested in libellant the right to discharge the second engineer for good cause, without, and even against, the consent of the master; and habitual drunkenness would be good cause, if such was the fact. There was, however, a preponderance of evidence that such was not the fact, but that libellant, having made up his mind to leave, the complaint as to the second engineer's habits was a mere excuse for leaving. I think, therefore, for both reasons, there was no just cause for libellant's leaving.

Libellant so left during a voyage, after the steamer had left her home port, and at a place where it was difficult to supply his place, causing considerable delay in the prosecution of the voyage, and thus resulting in damages to the owners to an amount much larger than the balance of wages then due. Under all these circumstances it must be held that libellant's leaving was a desertion, within the meaning of the maritime law, and that the same worked an entire forfeiture of the balance of his wages then due.

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There was, however, still another cause of forfeiture independent of the desertion. By a preponderance of evidence it appeared that on the way from Detroit to Port Huron, where libellant left, he wilfully, and for the purpose of compelling the steamer to stop at Port Huron, deranged the engine. It was conceded at the hearing, and as is no doubt the law, that if so found by the Court, this fact alone would be sufficient cause of forfeiture of wages.

Libel dismissed.

THE YOUNG AMERICA.

FEBRUARY, 1875.

COLLISION.—INSUFFICIENT MANNING PRESUMPTION OF FAULT.

Where the master of a small tug was also acting as wheelsman and lookout, but it was clear this fact did not contribute to the collision, *Held*, the tug was not thereby chargeable with a fault.

But where the master, even of a small scow, was acting as wheelsman and lookout, and the proofs left it doubtful whether this contributed to the collision, the scow was held liable.

This was a libel, by the same libellant, *in rem* against the tug Young America and scow Home, and *in personam* against Francis B. Cottrell, owner of the scow Wilcox, for the same collision, and the two causes were heard together.

The collision occurred about noon on the 22d day of November, 1871, at the lower end of the new canal on St. Clair Flats, by the libellant's vessel, the scow Liberty, first bringing up against the lower end of the pier on the port side coming down, and the scow Wilcox running into her stern while she lay against the pier, causing injury to both her stem and stern.

The scow Home was in tow of the tug coming down, and

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the other two vessels were under sail also coming down, the tug and Home ahead, the Liberty next, and the Wilcox in the rear.

The faults charged against the respective vessels appear in the following opinion.

Mr. *H. B. Brown*, for libellant in both cases.

Mr. *W. A. Moore*, for the tug Young America.

Mr. *Jno. Atkinson*, for the scow Home.

Mr. *F. H. Canfield*, for respondent Cottrell.

LONGYEAR, J. I. The only faults charged against the tug are: 1. Casting off the line of the Home while still in the canal, and without any warning to the other vessels, and 2. Want of necessary officers and crew.

1. The first charge is not only denied by the answer and not sustained by the proofs, but is unquestionably negated by the proofs.

2. The second charge is sustained by the proofs in this, that the master was acting as wheelsman, and there was no lookout man on duty (*The Victor*, decided by this Court, July 29, 1873). But no liability can be attached to the tug on this account in this case, because it is clear from the proofs that this fault did not contribute to the collision, as will appear hereafter when considering the case of the other two vessels.

II. The only charge of fault against the Home was for paying off when her line was dropped by the tug so rapidly that the Liberty could not pass her, whereby the latter was caused to collide with the pier.

This is clearly not sustained by the proofs. The Home did pay off, as a matter of fact, not in consequence, however, of her line being dropped by the tug, because her line had not then been dropped, but in consequence of a puff of wind driving her up on to the tug, and obliging her to pay off to avoid

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running into the latter. The same puff of wind drove the Liberty at the same time up alongside and to leeward of the Home. The vessels having the wind from the starboard and nearly a-beam, the sails of the Liberty were becalmed by the wind being taken from them by the sails of the Home, and in order to extricate her the helm was put to starboard, and other measures taken to make her pay off still more. At first she did not seem to mind her helm, but when she did she payed off very suddenly and very rapidly, and although strenuous efforts were made to bring her back on her course, she proved to be unmanageable, and kept on quite sharply across the channel, and ran against and collided with the pier near its lower extremity, on the port side coming down. She struck the pier at an angle of from two to three points from the line of the channel bank, and did considerable injury to her port bow. The proofs showed that there was ample room for her to have passed between the Home and the pier, and that she could and would have done so with safety, but for her bad steering qualities or some mismanagement on board of her, or perhaps both. There was, therefore, no case made out against the Home.

III. The allegations of fault against the Wilcox are: 1. No lookout; 2. Not properly manned; 3. No proper precautions to avoid the Liberty; 4. Not coming to windward far enough to avoid the Liberty.

The first and second allegations of fault are fully sustained by the proofs. There was no lookout man on duty, and the master was acting as wheelsman. These are positive faults for which, in case of collision, a vessel will in all cases be held responsible, unless it can be shown by the vessel so in fault, clearly and satisfactorily, that such faults did not contribute to the collision. This was not so shown in this case. The most that can be said is that it was left in doubt whether the Wilcox could or could not have avoided the Liberty after it became certain that the latter could not be brought back on her course, and was in danger of colliding with the pier, even if the former had had a lookout man on duty, and the master

The Young America

had been giving his undivided attention to the navigation of his vessel. The rule above alluded to applies especially to vessels navigating narrow channels, with other vessels ahead in the channel, and in their immediate vicinity, involving the risks of emergencies, as was the case here, requiring intelligent and prompt action on the part of the officer in command (*The Genesee Chief*, 12 How. 443, 463; *The Victor*, *supra*). The case against the defendant Cottrell is therefore sustained.

IV. The only remaining question is, whether the *Liberty* was herself free from fault. This must be held in the negative, for the same reasons and on the same grounds for which the *Wilcox* has been held liable. The libellant is therefore entitled to recover against the respondent Cottrell for a moiety only of the damages done to the stern of the *Liberty*. The damages done to the bow of the *Liberty* were done by her colliding with the pier, for which the *Wilcox* was in no manner responsible.

Libel against the *Young America* and the *Home* dismissed, with costs to claimants. Decree against Cottrell for a moiety of the damages occasioned by the injuries done to the stern of the *Liberty* by the collision, and referring it to a commission to ascertain and report the same. Costs reserved till the coming in of the commission's report.

Ordered accordingly.

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JOHN R. GILLET *et al.* v. JEROME PIERCE *et al.*

FEBRUARY, 1875.

PRACTICE.—RIGHT TO JURY TRIAL UNDER THE ACT OF 1845 AND
THE REVISED STATUTES.

Unless given by statute, there is no right in admiralty to a trial by jury.

The Act of 1845 was passed upon the assumption that, by the Constitution and Judiciary Act of 1789, admiralty jurisdiction was limited to tide waters; that cases arising upon the lakes were cognizable only in the common law courts, and were consequently triable by jury under the Constitution; and that Congress could not transfer the jurisdiction in such cases to Courts of Admiralty, without "saving to the parties the right of trial by jury." Congress did not intend by this clause to grant a new right, but to save one already supposed to exist.

The assumption upon which the Act was passed having been declared to have had no existence, the entire Act, including the saving clause of a right to a trial by jury, became inoperative.

By the Revised Statutes, however, the law is changed, and the right to a trial by jury is expressly given in the class of cases specified in the Act of 1845. The party demanding a jury must bring himself by his pleadings within the provisions of the Act.

MOTION of libellants to strike from respondents' answer a demand for a jury trial. The action was *in personam* on a contract for towing certain rafts of timber for the respondents from various places on Lake Huron to Buffalo. The answer admitted the contract, but alleged, by way of defense, negligence and damages in the performance of it, and contained a request that the issue thus joined be tried by jury.

Mr. *H. B. Brown*, for libellants.

Mr. *W. A. Moore*, for respondents.

LONGYEAR, J. It was conceded that the right of trial by jury, in civil causes of admiralty and maritime jurisdiction,

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does not exist unless it is expressly given by some statutory enactment; but it was claimed that it is so given by the Act of Congress of February 26th, 1845, entitled "An act extending the jurisdiction of the District Court in certain cases upon the lakes and navigable waters connecting the same" (5 Stat. 726), as retained and embodied in the late revision of the statutes of the United States (sec. 566).

The history of this legislation is very peculiar. The Act of 1845 was passed, as is well understood, on the assumption, and as had been up to that time held by the Supreme Court, that by the Constitution and the Judiciary Act of 1789, admiralty jurisdiction was limited to tide water, and consequently did not extend to cases arising upon the lakes and navigable waters connecting the same. From this assumption it followed, as a matter of course, that at the time of the passage of that act all such cases were cognizable in the common law Courts alone. From this followed, equally of course, the further assumption that the Constitution (article 7 of amendments) guaranteed the right of trial by jury in all such cases. And from this followed, equally of course, the further assumption, that Congress could not transfer the jurisdiction in such cases from the common law to the Admiralty Courts, without saving that right to suitors, and so the language of the provision in question as originally enacted clearly indicates, "saving, however, to the parties the right of trial by jury of all facts put in issue in such suits, where either party shall require it" (5 Stat. 727). It is therefore clear to my mind that it was the intention of Congress by the clause not to *grant* or *confer* a right which had no existence without it, but simply to *save* a right which it was assured was already in existence, and which they had not the power to abrogate. It was a mere *saving* clause, necessary to make the Act constitutional upon the aforesaid theory on which it was based; and it was undoubtedly for that purpose, and that alone, that it was inserted, and not as a positive enactment. Looking at the clause in this light—and I do not see how it can be looked at in any other—it cannot be assumed for a moment that Congress had the re-

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motest idea or intention of making a positive grant of a right not already in existence.

But the theory upon which the Act of 1845 was based, and consequently the theory upon which the clause in question was made necessary, and the purpose for which it was inserted, have been decided by the Supreme Court to have had no existence (*The Genesee Chief*, 12 How. 443), and hence that the Act itself, as an Act extending admiralty jurisdiction as indicated by its title, was inoperative and of no effect (*The Eagle*, 8 Wall. 25). In these cases the Supreme Court decided that admiralty jurisdiction in this country was not limited to tide water; but on the contrary, that by force of the Constitution and Act of 1789, it extended to the lakes and navigable waters connecting the same. From this it followed that at the time of the passage of the Act of 1845, the very cases provided for by it, and as to which it assumed to confer jurisdiction upon the Admiralty Courts as a new jurisdiction, were already cognizable in those Courts, and hence that the constitutional provision guaranteeing the right of trial by jury in suits at common law had no application to those cases. In the case of the *Genesee Chief*, it is true, the Court upheld the Act, notwithstanding the opinion then promulgated, that the jurisdiction existed independent of it; but in the later case of the *Eagle*, the Court yielded to the only logical result of their former decision, and held that the Act itself was useless for the purpose expressed in its title, and for which it was passed; and that inasmuch as the only effect it would have if enforced at all would be to *limit* instead of *extend* jurisdiction, contrary to its plain intent and purpose, it was held to be inoperative and of no effect so far as it related to the question of jurisdiction.

This left the clause in question in this shape: In its inception it was the mere saving of a supposed constitutional right; and the necessity of it was because of the supposed pre-existence of such right. Inasmuch, therefore, as no such right did in fact exist, as we have already seen, the clause had nothing to act upon, could save nothing, and, in fact, was inoperative and of no effect, equally with the other provisions of the

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Act. This conclusion seems to me an inevitable and incontestible logical necessity.

I am not unmindful that in the case of the *Eagle*, the Supreme Court expressly excepted the clause in question from the effect of their decision holding the Act inoperative and of no effect, and that the language made use of by the learned judge who delivered the opinion (the late Judge Nelson), may admit of the construction that the Court considered the clause as giving the right of a jury trial in the cases specified in the Act. But it is to be observed that the question of the effect of that clause was not directly before them; and it must be presumed that it did not receive that consideration it would have received if it had been before them and fully presented. I think the greatest effect that can be given to that exception is, that the question as to the effect of that clause, or whether it could be given any effect standing alone as it was left by the decision, was left open and undecided.

If this were all, I should have no difficulty in holding that the clause in question was inoperative and of no effect, and that the libellant's motion to strike out and deny respondent's request for a jury trial ought therefore to be granted. But in the late revision of the United States statutes the revisors and Congress, probably looking alone to the language used by the judge in excepting the clause in question from the effect of the decision of the Supreme Court in the case of *The Eagle* (*supra*), have sought to retain it as an existing, effectual enactment, and as an express grant of the right in the cases specified in the Act of 1845. In the revision it is embodied in the same section with the general provision of the Act of 1789, in relation to trials of issues of fact in the District Courts, and the whole section is made to read as follows:

"Section 566. The trial of issues of fact in the District Courts, in all causes except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy, shall be by jury. In causes of admiralty and maritime jurisdiction relating to any matter of contract or tort arising upon or concerning any ves-

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sel of twenty tons burden or upward, enrolled and licensed for the coasting trade, and at the time employed in the business of commerce and navigation between places in different States and Territories upon the lakes and navigable waters connecting the lakes, the trial of issues of facts shall be by jury when either party requires it."

It will be observed that the language, and, it is respectfully suggested, the entire tenor and effect of the clause is wholly and completely changed from what it was in the act of 1845. In that act it was the mere saving of an erroneously supposed pre-existing right. In the revision it is an express grant of a right not previously existing. It is conceded that if retained at all, such change was essential to give the clause any force or effect whatever. The necessity for such change, however, furnishes to my mind an unanswerable argument why it ought not to have been retained, and why it ought to have been omitted from the revision as obsolete and of no effect. The embodiment of the provision in the revision in its changed form furnishes a remarkable instance of the manner in which laws may and sometimes do get upon the statute books without ever having been deliberately enacted. Being there, however, under the forms of legislation, it has become a law of the land, and as such, it must be obeyed. It is respectfully suggested, however, that, without further legislation, it is a mere excrescence upon the jurisdiction of the Admiralty Courts, partial in its provisions, impracticable of application in many of the cases sought to be provided for by it, and in some respects impossible of execution so as to do complete justice, for want of the necessary machinery to carry it out to its proper and legitimate results. It is partial, because it includes only a portion of the causes cognizable in the admiralty, and as to those it is limited to such only as arise in a restricted locality. It is impracticable in many cases, because in cases arising upon contracts or torts upon or concerning two or more vessels where one is within the class of vessels specified in the provision and the other is not, as frequently occurs here upon these border waters, two trials may be made necessary, one

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with a jury and one by the Court without a jury, and that upon the same state of facts, and often resulting perhaps in different and opposite judgments, and thus involving inextricable confusion. In some respects it is impossible of execution so as to do complete justice, because no provision is made for a review of cases thus tried, and it thus defeats a valuable right which a party feeling aggrieved would otherwise have. By the Constitution (Art. 7 of Amendments), "no fact tried by jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." By these rules the only mode known by which facts tried by a jury may be re-examined, other than by granting a new trial by the Court where the issue was tried, is by the award of a *venire facias de novo* by an appellate Court, for some error of law which intervened in the proceedings (2 Story on the Constitution, 3d ed. 548; *Insurance Company v. Comstock*, 16 Wall. 258, 269); which mode, however, is not known to proceedings in admiralty, and can have no application to such proceedings without express legislative enactment. The only provision in existence for the review of judgments and decrees in the District Courts in civil causes of admiralty and maritime jurisdiction is by appeal (sec. 21, Act of 1789, 1 stat. 83) An appeal entitles the parties to a full rehearing upon the facts as well as the law, which, however, cannot be had by the rules of the common law in a case tried by a jury in the District Court, and by which rules alone, as we have seen, a case so tried, can be reviewed.

The imperfections and incongruities of the provision have doubtless arisen in a large degree from the mistaken theory upon which the Act of 1845 was based, and the peculiar circumstances under which the enactment has found its way into the revision. It is to be hoped that the attention of Congress will be speedily called to the matter, when they will undoubtedly repeal the provision or make it general and uniform, applicable alike to all cases and all localities; and at the same time make ample provision for a review of cases thus tried.

If trial by jury in admiralty causes is to be allowed at all,

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either under the present limited or more extended provisions, It would, if permitted, suggest that it be left to the discretion of the Court in each individual case; and that it be accomplished by making up an issue under the direction of the Court and sending the same to be tried by a jury on the common law side of the Court, as is done in equity causes, and also, I believe, in the English Admiralty. This course would do away with some of the difficulties above suggested.

The pleadings do not bring the present case within the provisions of the enactment, it nowhere appearing by the libel or the answer that the vessel concerning which the contract in question arose was "enrolled and licensed for the coasting trade." The motion must, therefore, be granted and a trial by jury denied.

Motion granted.

DISTRICT COURT.
EASTERN DISTRICT OF MICHIGAN.

HON. HENRY B. BROWN, DISTRICT JUDGE.

THE HERCULES.

SEPTEMBER, 1875.

**STALE CLAIM.—LIMITATION OF ACTIONS AS AGAINST BONA FIDE
PURCHASERS WITHOUT NOTICE.**

Creditors of vessels plying upon the lakes must enforce their liens, as against *bona fide* purchasers without notice, during the current season of navigation, or within such reasonable time after the commencement of the next season as may be necessary to arrest the vessel.

Circumstances may occur, which would greatly abridge or lengthen this time. The fact that the former owner of the vessel told the buyer, when purchasing her, that there might be some small claims against the vessel, which he would pay—that he did not know what the claims were, or who held them—would not in the absence of negligence affect the purchaser with knowledge of any particular claim.

The fact that the purchaser takes a mortgage upon another vessel, indemnifying him against any claims upon the vessel purchased, does not operate to extend the time within which creditors should pursue their claims, or deprive him of his rights as a *bona fide* purchaser, without notice.

Nor can mere notice of the existence of a certain claim affect his rights, unless such notice be had at the time of purchase or of payment.

Where a claim accrued in August, 1873, and the libel was not filed until September, 1874, and the vessel in the mean time was easy of access, and several times in the port where the supplies were furnished: *Held*, that as against a person who bought and paid for her in January, without notice of the claim, the lien must be deemed waived.

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ON August 13th, 1873, certain fuel was furnished by libellant at Sarnia, in the Province of Ontario, to the tug Hercules, then owned by one McCarthy, a resident and citizen of Michigan. No effort was made to enforce collection of the claim during that season, and on the 19th of January, 1874, the tug was sold to William A. Mills and Sarah E. Mills, claimants, resident in Detroit, who paid for her \$6,000 in cash, taking a mortgage on the barge Eliza, to indemnify them against any bills that might be outstanding against the Hercules, and which should appear to be liens upon the tug in their hands. Libel was filed on the 10th of September, 1874. No question was made as to the value of the fuel, nor that the same was necessary and was furnished on the credit of the vessel. The answer averred, however, that the claimants were *bona fide* purchasers of the tug without notice of libellant's claim, and that the same had become stale by reason of his neglect to enforce it. This was practically the only defense set up in the case.

Mr. J. C. Donelly, for libellant.

Mr. H. H. Swan, for claimants.

BROWN, J. Much discussion is found in the elementary books upon the question, when a claim against a vessel becomes stale as against a *bona fide* purchaser without notice. So much depends upon the facts and circumstances of each case, that it is exceedingly difficult if not impossible to lay down any general rule applicable even to a particular class of cases.

The rule obtaining upon the seaboard, which forbids the libellant pursuing his claim, as against *bona fide* purchasers, after the end of the voyage next succeeding the contracting of the debt, served a good purpose when applied to the long voyages of sailing vessels, but is ill adapted to the exigencies of steam navigation, and I believe has become practically obsolete.

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Of course such a rule would be wholly inapplicable to lake navigation. Indeed, the short trips made by vessels here, can hardly be dignified with the name of voyages. Some other rule must be adopted, and it should be so well understood that persons giving credit may know how long it is safe to delay enforcing their claims without prejudice to their rights as against *bona fide* purchasers without notice.

In the case of *The Buckeye State* (Newb. 111), Judge Wilkins, of this district, refused to enforce a claim that had lain dormant for three years, and observed that there was "great reason to limit these tacit liens to the season of navigation, and not to extend their obligation beyond a year. If in the commerce of the ocean the lien cannot with propriety be extended, except under special circumstances contradicting the presumption which delay creates, beyond the voyage and the return to the home port where it may be enforced, with equal propriety should a season on the lakes, embracing the whole year, be conclusive, especially where the right of a purchaser without notice intervened."

In the case of *The Dubuque* (2 Abb. U. S. 20), my learned predecessor also refused to enforce a lien for wages after three seasons had elapsed, and held as a general rule that "a delay to enforce a maritime lien, after a reasonable opportunity to do so, shall be taken and deemed as a waiver of the same, as against subsequent purchasers or encumbrancers in good faith without notice, unless such delay is satisfactorily explained." I think, however, that this hardly gives sufficient latitude, as a reasonable opportunity may occur within a week by the return of the vessel to the port where the debt was contracted.

In the case of *The Favorite* (1 Bissell, 525), the District Court of Wisconsin refused to enforce a libel for the loss of goods, filed two years and ten months after the loss, and after a *bona fide* assignee of the bill of lading had seized the boat.

The whole subject received an elaborate consideration at the last June term of this Court in the case of the barge *Detroit*, decided by Mr. Justice Swayne (*ante*, p. 141). A claim for towage accrued against a vessel in May and June, 1865,

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while she was in the hands of a person who had contracted to purchase her. Having failed to fulfill his contract, she was returned to her owner, who took her to Canada within a month or two after the services were rendered, where she remained until June 27th of the following year. She was then resold to a *bona fide* purchaser without notice, who brought her within the jurisdiction of the Court, and kept her during the residue of the summer. On October 6th, the libel was filed and the vessel attached. Held, that the lien was waived and that the action could not be entertained.

The learned justice says: "In the case of the Buckeye State and the Dubuque a rule applicable to the lakes is laid down, that where the vessel has passed into the hands of a *bona fide* purchaser, claims of this character should be prosecuted within the current season of navigation, or at least within a year. I think this rule is founded upon the most solid consideration of good sense."

In fixing the time within which creditors of lake vessels must pursue their claims as against *bona fide* purchasers, I think it should be borne in mind:

1. That the credit given to vessels for supplies and towage is often extended through the winter following the contracting of the debt, and until the opening of navigation in the spring, though this can hardly be called the general custom.

2. That transfers of vessels are usually made during the winter season.

The first consideration will lead the buyer to believe there may be outstanding claims against his vessel, and to protect himself accordingly; the second will induce the creditor to take prompt measures for the collection of his claim after the opening of navigation in the spring.

In view of these facts, I think it reasonable to hold as a rule applicable to vessels plying upon the lakes, that lien holders should have the current season of navigation to enforce their security, and such reasonable time after the commencement of the next season as may be necessary to arrest the vessel. This would not ordinarily extend the time beyond the 1st of June

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of the following year. Circumstances, of course, may occur, which would greatly abridge or lengthen this time. If the debt were contracted early in the season, and the vessel were immediately sold with the knowledge of the creditor, it might be inequitable to postpone collection after the close of the current season. If, on the other hand, the debt were contracted late in the season, and the vessel were not readily accessible, a further time might be allowed. Whether it would be the duty of the creditor to pursue the vessel into other districts than his own it is not necessary to determine. Much will depend upon the circumstances of each case.

Applying this rule to the present case, it is clear that, as the debt was contracted in August, 1873, and the libel was not filed until September, 1874, the lien must be deemed waived as against the claimant, unless excusatory circumstances exist, taking the case out of the general rule. Such circumstances are claimed to exist in this case.

1. Although the present owners had no notice of this claim at the time of the purchase, McCarthy did tell them there were a few claims against the vessel of small amount, which he agreed to pay. He also said he did not know what the claims were, or who held them. To ascertain these claims Mr. Mills caused notices to be published for two weeks in two daily papers in Detroit. It would seem, although the evidence on that point is somewhat conflicting, that libellant or his agent had seen this notice or heard of the change of ownership. But whether this be true or not, I do not think the general notice that there were small debts against the tug is sufficient to affect Mills with knowledge of the claim in question, in view of his efforts to ascertain such claims.

2. Although the purchase money was fully paid, there was a mortgage taken on the barge Eliza, to indemnify Mills against any claims which might be outstanding against the tug. There is certainly much force in the argument, that, as the requirement of diligence is solely to prevent injury to innocent third parties, if the Court can see that the third party is indemnified and cannot be injured, the rule should not apply.

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In the case of the Detroit, above mentioned, the collateral guaranty of a third party was taken to secure the purchaser against outstanding claims, and this same consideration was urged upon the learned judge who decided that case. He pronounced it unsound, however, and observed in his decision: "It is held in the authorities upon that subject that the very fact that the vendee accepts a quitclaim deed is strong evidence that he is not a *bona fide* purchaser, and such I conceive to be the law. I do not understand that a person, by taking the warranty of his vendor, or of a third party, loses the protection of the law applicable to *bona fide* purchasers."

This question did not arise in the case of *The Melissa* (*ante*, p. 476), as the proof showed that the suit was defended in fact by the vendor, and that the claimants had full protection by means of a balance of purchase money still remaining unpaid against the vessel.

I see no reason why the remarks made in the case of the Detroit with respect to guaranties are not equally applicable where the guaranty is in the form of a mortgage. The difficulty in libellant's position is this: The mortgage is taken for the protection of the purchaser, and not of the creditor. It is taken, not to extend the time within which claims may be enforced, or to furnish an excuse for delay, but to protect the buyer against claims which may be presented within the time allowed by law. It is, in fact, something with which the creditor has nothing at all to do. To give it weight might involve the buyer in litigations which he would otherwise have avoided. I must hold, therefore, that it has no bearing upon the present case.

3. About the middle of May, 1874, one Hartness, an agent of the libellant, came to A. H. Mills' office in Detroit, and said he had a bill from Mr. Keys against the tug Hercules for wood bought in 1873. In reply Mills told him that the boat had changed hands, and he must look to the previous owner. He said he knew she had been sold, and had seen the notice in the paper, and wanted to know where he could find McCarthy. Mills then showed him the barge which was lying

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opposite Detroit, on the Canadian side of the river, and told him McCarthy, the late owner, was living on board. He said he would go and present the bill, and as he left Mills told him to return and let him know whether the bill was paid or not, and if not, he would see about it. He promised he would, but did not return. I think his conduct was such as to mislead Mills and induce him to believe he no longer looked to him for payment of the claim. Had he at once returned, and upon Mills' refusal to pay libelled the vessel, I should have held his claim still in force.

4. On July 9th, the tug being at Sarnia, the bill was presented to William A. Mills, one of the claimants, who told libellant the boat had been sold, and that he had nothing to do with the bills. He replied he knew it, and had seen it in the paper. Mills then told him that he was part owner; that he had bought her clear of debt, but that McCarthy and his boat were in Detroit, and that if he would send his bill to the tug office, care of A. H. Mills, McCarthy would straighten it. This was the first intimation that W. A. Mills had of the claim. On July 17th, libellant sent the claim to A. H. Mills, saying, "The captain of the tug Hercules instructed me to send the enclosed draft to you for collection." In reply Capt. Mills wrote him, under date of July 20th, that the "reason that the captain of the Hercules told you to send the draft to me was because Capt. McCarthy was in Detroit at the time with his barge, in dock; also that the Frankfort was there to get a new wheel, and was there for nearly a week; however, if you will send your bill to Mr. McCarthy, if it is correct, he will pay; he is, I consider, an honest man, and has paid all bills that come within his notice, etc."

"If you have the draft in Detroit, I could try and see him about it." I do not know that it appears directly that Mills returned the draft in his letter, but such I think is the inference from the facts hereinafter stated.

The claim appears to have been soon afterwards placed in the hands of an attorney in Port Huron, with instructions to present it, but *not to sue it*. After some ineffectual corre-

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spondence, he drew a libel and forwarded it to Detroit, September 10th, when this suit was commenced.

After the debt was contracted, and during the residue of the season of 1873, the tug was plying upon Detroit river, occasionally stopping at this port. During the season of 1874, and prior to her seizure she was plying between Lake Erie and Lake Huron, and stopped at Sarnia no less than six times, her halts being from half an hour to three hours in length, and always in the day time. McCarthy received \$6,000 in cash for her in January, and appears to have been in good credit, with money on deposit in Detroit until July or August. I think it is shown by a preponderance of evidence that libellant knew of the change of ownership shortly after it occurred. It was his duty under the circumstances to act with promptness in proceeding to enforce his lien. He should have filed his libel immediately after his interview with A. H. Mills in May, if not before. It is true that Mills had then, and also in July, notice of this claim, but I do not understand that mere notice can affect the rights of a *bona fide* purchaser, unless such notice be had at the time of purchase, or of payment (*Blanchard v. Tyler*, 12 Mich. 339). If any equities at all were raised by reason of the mortgage on the barge Eliza, they ceased by her disappearance from these waters, at or about the time the libel was filed. It would seem that Mills made persistent efforts to find her, and that she was reported lost.

Upon the best consideration I have been able to give this case, I think it would be inequitable to enforce this lien, and the libel must therefore be dismissed with costs.

Libel dismissed.

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excepted peril, the carrier is liable. He is bound to take such precautions as he can foresee are necessary under the circumstances of the case. *ibid.*

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1. The Court will allow amendments upon terms, even on the hearing of an appeal. *The Morton*, 137
2. A Court of Admiralty has no power to permit a libel to be amended by striking out the name of a sole libellant and substituting another in its place. Such amendment is virtually the institution of a new suit, and discharges the sureties upon the stipulation. *The Detroit*, 141
3. It is the duty of the claimant, however, to put his objections upon the record, and unless he does so, he will be deemed to have waived them by appearing, examining witnesses, and contesting the case upon the merits. *ibid.*
4. Where the original libel set up a grossly false case, and an attempt

has been made to support it by inherently incredible proof, although an amendment has been allowed in the Court below, alleging a right of recovery upon wholly different grounds, these facts may rightly be looked to on appeal, in denying relief by a division of damages, in favor of a libellant who thus concealed his own wrong, and sought a recovery in full from the respondent. *The Sunnyside*, 227

5. It is not competent to amend a joint libel against three vessels, by substituting the name of the owner of one vessel for the vessel, so as to change it from a libel *in rem* to one *in personam*. *The Young America*, 462

6. A libel *in rem* cannot be changed into a libel *in personam* against the owner. *ibid.*

7. A party will not be permitted to amend his claim by setting forth that at the time the cause of action arose, he *was* the true and *bona fide* owner of the vessel, and had agreed with the present owner to discharge all liens against her. *The Prindiville*, 485

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2. A document purporting on its face to be a bill of purchase by a vessel of certain stone, and signed by her master (the stone being delivered to her as cargo), has none of the elements of a bill of lading, and cannot be interpreted as such. *The Skylark*, 861

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1. Where a tug is working at a vessel aground in the channel of St. Clair flats, it is her duty to obstruct navigation as little as possible, and to give way to passing vessels, though it may require a temporary suspension of her efforts. *The Napoleon*, 82

2. In approaching a tug so engaged, the master of a steamer has a right to rely upon her ob-

- servance of this duty, and the same precautions are not demanded of him as would be if no such obligation rested upon the tug. *ibid.*
8. A tug coming down a river one mile in width, and encountering a vessel anchored upon the windward side of the channel, was held in fault for not passing the anchored vessel to leeward, it appearing that about three-fourths of the navigable water was upon that side. *The Lyon*, 59
4. An improper order given in a moment of imminent peril is no fault. *The Zouave and Rich*, 110
5. A schooner lying at anchor with her sails up, in a channel 1,500 feet wide, was damaged by a steamer coming down the channel at the rate of 12 miles an hour, and endeavoring to pass between the schooner and another vessel which lay about 400 feet ahead of her. *Held* :
 (1) That the schooner had a right to lie where she did with her sails up, though there was a *puffy* wind.
 (2) That no anchor watch was necessary in the day time.
 (3) That the steamer was solely in fault for not giving the schooner a wider berth. *The Planet*, 124
6. A tug lying in the open lake, waiting for a tow, and exhibiting colored lights, is held to the responsibility of a steamer under way. *The Sunnyside*, 227
7. Where a steamer in the open sea, lying at rest directly in the path of a sailing vessel, exhibited colored lights, as if she were under way, and the latter was guilty of no negligence in not discovering the false indication of the lights in time to avoid a collision, she was held faultless in keeping her course, although the steamer was sunk by the collision. *ibid.*
8. In the absence of a law or custom prohibiting vessels from lying in a channel, anchorage there is not necessarily improper because the channel is narrow at that point, and vessels are constantly passing and repassing, if room be left for vessels and tows to pass in safety. In such an anchorage, however, a vigilant anchor watch is imperatively necessary. *The Masters and Raynor*, 342
9. A sailing vessel entering a crowded harbor at the rate of six miles an hour, in addition to a favorable current of four miles, condemned for too great speed. *The Masten*, 436
10. It is not improper, under any and all circumstances, for a steam vessel to enter the old channel of St. Clair flats, and attempt to pass through, while another vessel is aground upon one of its banks. It depends upon the apparent situation and circumstances of the vessel aground. *The Thomas A. Scott*, 503
11. A vessel aground in a narrow channel, but in a situation to admit of other vessels passing her in safety, should, on the approach of another vessel, cease her efforts to get off until such other vessel has passed. *ibid.*
12. Where a schooner aground upon St. Clair flats, upon an even keel, with room for other vessels to pass, saw a large propeller approaching, and did not cease her efforts to get off, but swung partly across the channel; *Held* :
 (1) That the propeller was not in fault for coming down the channel with the intention of passing the schooner while aground. (2) Nor was she in fault for push-

ing on and attempting to pass the schooner on her starboard side, instead of stopping and backing. (8) Having been placed in sudden peril by the fault of the schooner, the master of the propeller could not be blamed when, in the exercise of his best judgment, he adopted a course which may have been erroneous. *ibid.*

BETWEEN STEAMERS.

13. It is not enough that steamers navigating a narrow channel are in charge of officers whose general competency is unquestioned; they should have a pilot on board acquainted with the particular channel, and the want of such pilot is *prima facie* a fault. *The Milwaukee*, 313

14. The absence of a lookout is not material, if the officer of the deck is in full possession of all the information a lookout could give him in time to avoid a collision. *ibid.*

15. Rule 1 of the supervising inspectors (1865) cannot be construed to authorize one steamer to dictate to another a departure from the rule prescribed by Article 18. The rule, however, may be sustained as an authority for an ascending vessel to propose to a descending vessel to depart from the requirements of the article, and for the descending vessel to accept such proposition, and to make such a departure, when thus mutually agreed upon, binding and valid. *ibid.*

16. It is incumbent upon the vessel claiming the protection of the rule and a departure from the statutory requirement to show:

(1) That a proposition to depart from the statute was made by her by means of the signals pre-

scribed by Rule 1, and in due season for the other vessel to receive the proposition and act upon it with safety.

(2) That the other vessel heard and understood the proposition thus made.

(3) That the other vessel accepted the proposition. *ibid.*

17. There is no general obligation upon vessels navigating rivers to keep to the right of the centre of the channel, and no such custom proven to exist upon St. Clair flats. *ibid.*

18. Risk of collision begins the moment two vessels have approached so near that a collision might be brought about by any departure from the rules of navigation, and continues up to the moment when they have so far progressed that no such result could ensue. Under such circumstances, vessels should adopt such a rate of speed as to be at all times under ready and complete control until the risk is passed. *ibid.*

19. A steamer descending a channel 850 feet wide at 14½ miles an hour, and another ascending at 8½ miles, both condemned for too great speed under the circumstances. *ibid.*

20. Whether the relative duty of the steamships to slacken speed under Article 16 (when they are approaching each other so as to involve risk of collision), attaches the same moment the duty to port attaches under Article 13 (when they are meeting end on, or nearly end on, so as to involve risk of collision), considered and discussed. *ibid.*

BETWEEN SAILING VESSELS.

21. In a collision between two sail-

- ing vessels, one close-hauled and the other with the wind free, the latter was held in fault for an insufficient lookout, and for failing to give way in time. *The Douglass*, 105
22. A lookout must be constantly at his post, and must not be interrupted in the performance of his duty. *ibid.*
23. Where a bark, close-hauled upon the starboard tack, was approaching a schooner close-hauled upon her port tack, at an angle of about six points, *Held*, that the bark had the right to keep steadily on her course, so long as there was any room for doubt as to the intentions of the schooner. *The H. P. Baldwin*, 300
24. The fact that the entire crew of the bark, including the lookout, were engaged, shortly before the collision, in tacking the ship, though a fault, was held not to have contributed to the collision, as they had resumed their duties a sufficient time before it took place. *ibid.*
25. The fact that the schooner was disabled, and partially unmanageable, did not impose upon the bark the duty of avoiding her, unless the disability was manifest to those upon the bark. *ibid.*
26. The fact that the lookout of the schooner was engaged, with the remainder of the watch, just previous to the collision, in hauling down the flying jib, which had become disabled, was a fault directly contributing to the disaster. *ibid.*
27. If an injured vessel is shown to have been in stays at the time of the collision, the burden of proof is upon the colliding vessel to show that she was not in fault. *The Charlotte Raab*, 453
28. The master of a vessel approaching another while in stays, has no right to speculate upon the chances of her coming completely about, getting under headway and avoiding him. *ibid.*
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29. A tug having vessels in tow, when meeting a sailing vessel, is subject to the rules applicable to ordinary steamers. *The Nabob*, 115
30. A tug having only a mate and wheelsman on deck is insufficiently manned. A lookout is absolutely necessary. *ibid.*
31. A propeller descending the Detroit river at her usual speed, made the green light of a scow very nearly dead ahead, and about the same time the red light of a steamer a little upon her port bow; the steamers exchanged single whistles and passed each other to the right; while passing the ascending steamer, the propeller starboarded to avoid the scow; when very near the propeller, and about one and a half points on her starboard bow, the scow ported, and threw herself across the propeller's course, and thereby came into collision with her and was sunk. *Held*, the scow was in fault for changing her course, and that the propeller was not in fault for failing to slacken speed before the scow exhibited a red light. *The Free State*, 251
32. A propeller meeting a sailing vessel in a clear night, with plenty of sea room, is under no obligation to slacken speed so long as the sailing vessel is apparently keeping her course, and no danger is apparent. *ibid.*

33. The words "risk of collision" are not used in the same sense in Articles 13 and 16 of the Collision Act; in the latter they apply only to cases of manifest *danger* of collision, and the obligation to slacken speed under Article 16 was not intended to be contemporaneous with the duty of porting under Article 13. *ibid.*
34. The cases upon the subject of speed reviewed and criticised. *ibid.*
35. A propeller of 1,400 tons burden, navigating Lake Huron in the usual track of vessels, in a dense fog, should have at least two men at the wheel, and two competent lookouts, experienced in the navigation of those waters. *The Colorado*, 393
36. A steamer should adopt such a rate of speed in a fog as will place her headway under such easy and ready command that she can be stopped within such distance as other vessels can be seen from her, on the assumption that such vessels will do their duty in apprising her of their proximity. *ibid.*
37. The chief officer of a steamer running in a fog should be so placed that he can have instant access to and command of the signals to the engineer. *ibid.*
38. An erroneous order, given in the midst of confusion and consternation incident to sudden peril, is not a fault. *ibid.*
39. A crew cannot be held in fault for abandoning a vessel when her injury is of such a character as to afford reasonable apprehension that all efforts to save her will be unavailing and perilous. *ibid.*
40. A vessel in tow is bound to prevent a collision if she can, or to make the damages as light as possible. *The Morton*, 137
41. A tug, having five vessels in tow, while running down a narrow, crooked channel, at a speed, with the current, of about seven miles an hour, overtook and attempted to pass a raft of timber in tow, moving at the rate of four and a half miles an hour, and occupying about one-half the width of the channel. One of the vessels grounded upon the port bank, and the one next astern ran into and injured her :
Held, that the tug was in fault :
 (1) For not sooner discovering the raft, and that it was in motion ;
 (2) For attempting to pass it in a narrow channel.
Held, also, that the colliding vessel, not being affirmatively shown to have been negligent, cannot be held in fault. *The David Morris*, 273
42. A tug, having a schooner in tow, ran aground upon the bank of Detroit river, and the schooner ran into her :
Held, that the tug was in fault, because the officer of the deck was also acting as wheelsman, and that the want of a proper lookout on the schooner did not contribute to the collision. *The Victor*, 449
43. A steam-tug, whose master also acts in the capacity of wheelsman, is insufficiently manned. *ibid.*
44. A tug, whose chief officer also acts as wheelsman, is insufficiently manned, and every doubt as to her being in fault will be resolved against her. *The Coleman and Foster*, 456
45. The fact that she is fully manned, according to the custom of

WITH VESSELS IN TOW.

- tugs plying on those waters, is no excuse. *ibid.*
46. In case of uncertainty or irreconcilable conflict of testimony between a tug and her tow, as to their respective manœuvres, the fact that the tug is insufficiently manned will be regarded as a fault contributing to the collision. *ibid.*
47. Where the persons in charge of a tug and tow jointly participate in their control and management, the tug and tow are jointly liable for an injury done to a third vessel. *ibid.*
48. A request by the masters of a tow to divide the vessels composing it, and take them separately through a narrow channel, would not create an obligation on the part of the tug to do so. It is the duty of the master of the tug to make up the tow, and he is entitled to exercise his judgment in that regard. *The Sweepstakes*, 509
49. In arranging the order of vessels in tow, regard should be had to dangers incident to any portion of the route covered by the undertaking, and in passing through the channel of St. Clair flats the vessel of heaviest draft should be placed last. *ibid.*
50. The rule of the supervising inspectors requiring ascending vessels to stop before entering narrow channels, and wait till a descending vessel has passed through, does not apply to the lakes and their connecting waters. *ibid.*
51. In the absence of usage or positive law, it is not a fault for a tow to enter the channel of St. Clair flats while another tow is coming through in an opposite direction. *ibid.*
52. It is the duty of the tug to see that the tow-line is securely fastened, so as to hold in all emergencies likely to happen, ordinary or extraordinary, and the fact it does not so hold is the best evidence the duty is not performed. *ibid.*
53. Tugs are *prima facie* responsible in all cases for damages resulting from the slipping of the line. *ibid.*
- MISCELLANEOUS.
54. When a light has once been announced to the officer in charge of a vessel obliged, under the rules, to keep her course, and he has carefully observed its character, bearing, and course, and all apparent conditions indicate absolute safety if the law is complied with, he may leave the future watching of *such* a light to an experienced lookout, in confidence that the vessel bearing it will be guilty of no gross negligence. Especially he may return to his other necessary duties midships. *The Sunnyside*, 227
55. If any circumstances suggest danger, or a departure from the ordinary rules by the other vessel, then the duty of greater watchfulness is imposed upon the master, and he would not be authorized to leave to an unassisted lookout the duty of determining when a reannouncement of the light was necessary. *ibid.*
56. If, in these circumstances, the duty of watching a light has been fairly performed, the Court should not severely criticise the best exercise of an officer's judgment, although believed to be erroneous. Especially should it not be deemed a *fault* when the conduct of the other ship has been gross and unwarrantable. *ibid.*

57. Where the libellant has been guilty of gross fault, and that of the respondent is in any degree doubtful, a decree for division of damages should not be rendered. *ibid.*

58. It is not the duty of a lookout to reannounce a light, unless some new conditions occur which an intelligent officer of the deck would not anticipate, and in reference to which some new order would be given. In this case, the continuous bearing of the tug, which indicated her to be at rest instead of under way, did not present such conditions, as the fact was common, and did not suggest the slightest danger or difficulty. *ibid.*

59. Cases upon the subject of speed, reviewed and criticised. *The Free State*, 251

60. A vessel can be held in fault for her conduct only to the extent of risk or danger of collision with another vessel, as indicated by the relative situation of such other vessel at the time she determines upon a particular course of action, making proper allowance for the probability of a change in the relative situation of such other vessel. *The Thomas A. Scott*, 503

61. Where the master of a small tug was also acting as wheelsman and lookout, but it was clear this fact did not contribute to the collision:
Held, the tug was not thereby chargeable with a fault. *The Young America*, 549

62. But where the master, even of a small scow, was acting as wheelsman and lookout, and the proofs left it doubtful whether this contributed to the collision, the scow was held liable. *ibid.*

See TOWAGE, *passim*.
JURISDICTION, 6, 7, 18.
LIEN, 7.
DAMAGES, *passim*.

CONSTITUTIONAL LAW.

See NAVIGATION LAWS, 1.

CONSTRUCTION.

See JURISDICTION, 20.

CONTRACT.

See DAMAGES, 1.
SEAMAN'S WAGES, 5, 6.

COSTS.

1. Where the libellant claimed \$70, and recovered but 80 cents, and the respondents claimed a larger amount of damages than they were able to prove:
Held, that neither party should recover costs. *The David Morris*, 273

2. Costs are recoverable where the suit is defended in the interest of a former owner, though no demand had been made of the claimants. *The Melissa*, 476

See PRACTICE, 18.

CUSTOM.

See DEMURRAGE, 2.
TOWAGE, 2.

CRIMINAL LAW.

1. The great lakes are not "high seas" within the meaning of the Act of July 29, 1850, punishing the burning of vessels. *Henry Miller's Case*, 156

D

DAMAGES

1. Where the master of a schooner who had taken passage on a steamer to rejoin his vessel, was carried past the place for which he had bought his ticket, and at which the steamer usually stopped, he was held entitled to recover not only for his personal expenses and loss of time, but damages in the nature of demurrage for the detention of his vessel. *The Canadian*, 11
2. The libellant in a collision case, when successful, is entitled to recover the full amount of his damages, notwithstanding he may have received partial indemnity from the underwriters. *The Avon*, 170
3. In the absence of a market value for the use of vessels, the value of such use to the owner, in the business in which she was engaged at the time of the collision, is a proper basis for estimating damages for detention. *The Myflower*, 376
4. The books of the owner, showing previous and subsequent earnings, are competent evidence of the probable earnings during the detention. *ibid.*
5. The party in fault should bear whatever inconvenience or hardship there may be in proving the exact amount of damages sustained. *ibid.*
6. In cases of conflicting testimony as to amounts, where the preponderance is not palpable, the finding of the commissioner will not be disturbed. *ibid.*
7. The services of an agent employed in settling and paying bills is not a proper item of damages. *ibid.*
8. Estimates of the cost of repairs, though competent in absence of better evidence, are not so where the repairs have been actually made. *ibid.*
9. In case of total loss by collision, the market value of the vessel just before the collision is the measure of damages. *The Colorado*, 411
10. The market value is not what she would have brought at forced sale, but in the ordinary course of the sales of such property. *ibid.*
11. From the gross freight should be deducted the probable future expenses of earning the same. *ibid.*
12. Where a tug injured by a collision was a member of an association, into which each boat was put at an appraised valuation, and each drew its *pro rata* share of the net earnings of the whole, according to its valuation, the dividends paid by the association during the time the tug was laid up for repairs were held to furnish a proper basis for demurrage. *The Sunnyside*, 415
13. Demurrage cannot be allowed for unnecessary or unexplained delays. *ibid.*
14. The salary and board of the master while superintending the repairs was also held a proper charge. *ibid.*
15. When the contract for raising the tug was let at a specific sum, with the proviso that the contractor should have the use incidentally of any other tugs belonging to the association, the services of these tugs were held a proper item of damages. *ibid.*

16. Where a vessel is ground amidships, and in danger of springing a leak, and wetting a valuable cargo, Courts will not, as against the party by whose negligence she was grounded, scrutinize very closely the expense of getting her off, provided the master has acted in good faith. *The Michael Groh*, 419

17. The expense of a protest made before unloading will be allowed, though it proves to be unnecessary. *ibid.*

18. The master of a barge, having an order for a cargo of coal, was directed by the shipper to go to an upper dock, take on 800 tons, and then to return to the shipper's own dock and receive the residue of the cargo. Having taken on the 800 tons at the upper dock, he immediately put to sea, without calling for the residue as agreed, without signing bills of lading, or reporting his departure, and the barge and cargo were lost by a peril of the sea. An understanding between the consignee and shipper was shown, that the shipper should insure all cargoes shipped upon vessels of that class for the benefit of the consignee.

Held, that the owner of the barge was not liable for the loss of such insurance by reason of the neglect of the master to report his departure, he having no knowledge of the understanding between the shipper and consignee. *The Ontario*, 480

19. The failure to report in such case cannot be deemed the proximate cause of the loss of the insurance. *ibid.*

DECREE.

See PRACTICE, 3, 4, 5.

DEMURRAGE.

1. Where no "lay days" are provided in the charter party or bill of lading, and there is no express stipulation as to the time of unloading, the consignee is not liable for delays occurring without his fault. *The Glover*, 166

2. If it is a custom at the port of delivery for vessels to be unloaded through an elevator, each vessel waiting its turn, such custom becomes part of the contract, and the master takes upon himself the risks and delays incident to such a method of unloading. *ibid.*

See DAMAGES, 3, 4, 12, 13.

DEPOSITION.

See PRACTICE, 7, 11, 12, 13.

DESERTION.

See SEAMAN'S WAGES, 7, 8, 9.

DURESS.

See MASTER, 2.

E

EVIDENCE.

1. The fact that the claimant was selling goods supposed to have been smuggled, at a low price in an obscure town, declaring them to have been imported, and that duty had been paid upon only a small portion, was held sufficient to justify their seizure. *The Gala Plaid*, 1

2. But little credence can be given to the testimony of a sailor who

contradicts statements deliberately made by him, in writing, immediately after the collision. *The Douglass*, 105

3. Great weight should be given to the admissions of the master of a colliding vessel, though not upon deck at the time of collision, who states to the injured party that his own vessel was in fault, and promises to pay the damages done by her. *ibid.*

4. The opinion of the master and crew of a tug, that their vessel was properly managed, and that the accident was inevitable, is entitled to very little if any weight. *The Armstrong*, 180

5. The admissions of a party to a suit may be given in evidence as independent testimony, though he has been sworn as a witness, and no impeaching questions asked him. *The Stranger*, 281

6. The statute permitting parties to be sworn has not changed the practice in this regard. *ibid.*

7. The testimony of the officers and crew of each vessel, as to the number of whistles blown upon their own vessel, is to be believed in preference to that of an equal number of witnesses upon the other vessel. *The Milwaukee*, 318

8. Evidence of verbal statements made in time of excitement and peril should be received with great caution, and when opposed to the direct and concurring testimony of many witnesses, is entitled to but little weight. *The Masten*, 486

See BILL OF LADING, 1.
AMENDMENT, 4.
DAMAGES, 4-6.

F

FEEES.

See MARSHAL, 2.

FOREIGN LAWS.

See LIEN, 3.

FREIGHT.

See LIEN, 5, 6.

G

GENERAL AVERAGE.

1. Where by the bill of lading it is agreed that a portion of the cargo shall be carried on deck, the vessel must contribute for the loss of the deck load by jettison. *The Watchful*, 469

See MARSHALING OF LIENS, 3.

I

IMPORTATION.

See REVENUE LAWS.

INFANCY.

See SEAMAN'S WAGES, 10.
PRACTICE, 21.

INSPECTION.

See NAVIGATION LAWS, 1.

INSURER.

1. The underwriter, where there is no abandonment, has no authority to direct the master, or to contract for the vessel. *The Senator*, 544

INTERVENTION.

See PRACTICE, 15.

J

JETTISON.

See GENERAL AVERAGE, 1.

JURISDICTION.

1. Though a Court of Admiralty is not bound to take jurisdiction of controversies growing out of contracts between foreigners having a domicile in this country, it may lawfully exercise it, and ought to do so, where justice requires it. *The Sailor's Bride*, 68
2. It has jurisdiction in a case of salvage rendered by an American tug to a British vessel in Canadian waters. *ibid.*
3. Admiralty has jurisdiction of a suit to recover for services of a tug in hauling off a vessel aground, though the same do not amount to a salvage service. *The Clarion*, 74
4. Admiralty and maritime jurisdiction is possessed by the District Courts of the United States, on the Western lakes and rivers, under the Constitution and Act of 1789, independent of the Act of 1845, and unrestricted thereby. *Revenue Cutter No. 1*, 76
5. The District Courts of the United States having, under the Constitution and Acts of Congress, exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, the Courts of common law are precluded from proceeding *in rem* to enforce such maritime claims. *The Isabella*, 96
6. The admiralty has jurisdiction of a collision between a canal-boat and a tug engaged exclusively in harbor service, and occurring

upon navigable waters wholly within the body of a county. *The Volunteer*, 159

7. An action will not lie in admiralty against a vessel to recover for damage done by her to a bridge thrown over a navigable stream. *The Neil Cochran*, 162
8. The waters of the Welland Canal, as now used for international commerce, are within American admiralty jurisdiction. The Suez and other canals, and all the improved navigation of the world, have been, and from the nature of their use should be, as much subject to admiralty jurisdiction as waters in natural channels. *The Aron*, 170
9. While a natural thoroughfare, although wholly within the dominion of a government, may be passed by commercial ships of right, yet the nation which constructs an artificial channel may annex such conditions to its use as it pleases. *ibid.*
10. When it may be inferred that the maritime law sought to be applied is excluded by the *lex loci*, the remedy *in rem* should be denied. If from the circumstances a contrary presumption arises, the principle of the maritime law involved should be enforced. *ibid.*
11. It is not enough *per se* to deprive a Court of admiralty jurisdiction, that collision happens where there is municipal power to exclude the maritime rule. It must further appear that it has actually been done. The mere absence of a tribunal to enforce the maritime law has never been admitted as sufficient evidence of intention to exclude it. *ibid.*
12. No argument can be drawn from the fact that the Welland Canal is a *tideless* water, and that

therefore the authorities which sustain admiralty jurisdiction over torts and contracts, in foreign waters, do not extend the maritime law over it. Admiralty Courts have taken jurisdiction wholly irrespective of the fact of a tide. *ibid.*

13. Inapplicability of the *lex loci contractus*, the *lex rei citæ*, and the *lex loci delicti*, where obligations growing out of international commerce are to be adjudicated with reference to the maritime law, considered. *ibid.*

14. Saginaw river, though wholly within the State of Michigan, is a public navigable stream, and within the admiralty jurisdiction. *The General Case*, 884

15. If the business or employment of a vessel appertain to travel, or trade and commerce on the water, it is subject to the admiralty jurisdiction, whatever may be its size, form, capacity, or means of propulsion. *ibid.*

16. Such jurisdiction extends to lighters employed in carrying lumber out to vessels lying in deep water. *ibid.*

17. The fact that these lighters are not enrolled or licensed does not affect the question of jurisdiction. *ibid.*

18. An action will not lie in admiralty against a vessel to recover damage done by her to a wharf projecting into navigable water. *The Ottawa*, 856

19. Wharves are but improvements or extensions of the shore, and injuries done to them, no matter by what agency, are injuries done on land, and do not constitute maritime torts for which an action in the admiralty can be maintained. *ibid.*

20. A hull completed at the place of launching received a small cargo of flour as ballast, was towed with her spars on deck to another port, where her masts were stepped, and the vessel put in condition for navigation :

Held, that the work was done in *building* the vessel, and that admiralty had no jurisdiction. *The Iusco*, 495

See TOWAGE, 2.

CRIMINAL LAW, 1.

LIEN, 14, 15, 16, 17.

JURY.

1. Unless given by statute, there is no right in admiralty to a trial by jury. *Gillet v. Pierce*, 558

2. The Act of 1845 was passed upon the assumption that, by the Constitution and Judiciary Act of 1789, admiralty jurisdiction was limited to tide waters; that cases arising upon the lakes were cognizable only in the common law courts, and were consequently triable by jury under the Constitution; and that Congress could not transfer the jurisdiction in such cases to Courts of Admiralty, without "saving to the parties the right of trial by jury." Congress did not intend by this clause to grant a new right, but to save one already supposed to exist. *ibid.*

3. The assumption upon which the Act was passed having been declared to have had no existence, the entire Act, including the saving clause of a right to a trial by jury, became inoperative. *ibid.*

4. By the Revised Statutes, however, the law is changed, and the right to a trial by jury is expressly given in the class of cases specified in the Act of 1845. *ibid.*

5. The party demanding a jury, must bring himself by his pleadings within the provisions of the Act. *ibid.*

L

LEX LOCI.

See JURISDICTION, 10, 11, 12, 13.

LIEN.

1. The clerk of a steamboat is a mariner, and entitled to a lien for wages. *The Sultana*, 18
2. There is no lien for wharfage. *The Gem*, 37
3. There being no lien by the local law for repairs furnished in Canada, no proceeding *in rem* can be maintained here to enforce the payment of such repairs. *The Mermaid*, 51
4. The purchase by the Government of a vessel for the revenue service does not divest the same of valid liens existing at the time the title was acquired. The Government takes *cum onere*, and the liens may be enforced by the ordinary methods. *Revenue Cutter No. 1*, 76
5. The delivery of a cargo to the consignee without demanding freight or notifying him of the master's lien therefor, will, in the absence of special agreement or local usage to the contrary, discharge such lien. *The Tan Bark Case*, 151
6. The mere intention of the master to retain his lien is not sufficient as against a consignee who has bought and paid for the cargo. *ibid.*

7. The general maritime law universally recognized by civilized nations gives a lien for a marine tort upon the offending vessel, and this lien travels with the ship into whosoever hands she may go. The proceeding *in rem*, to enforce such a lien, is not process. In no sense is it remedy only, or a part of the *lex fori*, but is the enforcement of a proprietary interest. *The Avon*, 170

8. This lien or proprietary interest is not divested by a sale to a *bona fide* purchaser without notice, unless had by virtue of a judicial proceeding *in rem*. A transfer within a jurisdiction where the offending ship is not subject to seizure does not constitute an exception to this rule. *ibid.*

9. A tug was hired at \$200 per day to go to the assistance of a vessel which had been reported aground on the shore of Lake Huron. On arriving on the spot, it was found the vessel had been gotten off, and the tug returned home without rendering her any actual assistance :

Held, a proceeding *in rem* would lie to recover the stipulated compensation. *The Williams*, 208

10. All maritime contracts made by the master, within the scope of his authority as master under the maritime law, *per se* hypothecate the ship, and performance, in whole or in part, does not affect the question of jurisdiction generally, or the character of the proceeding, whether *in rem* or *in personam*. *ibid.*

11. A libel *in rem* for salvage services will be sustained, though the contract was for a *per diem* compensation, not contingent upon success. *ibid.*

12. The nature of maritime liens

- discussed, and the authorities reviewed. *ibid.*
13. A vessel is not liable *in rem* for a cargo purchased by the master, although the bill is made out against the vessel, and signed by the master, who is also owner. *The Skylark*, 361
14. By the law of England previous to the statute of 8 and 4 Vict., no lien existed for supplies furnished domestic vessels. *The Champion*, 520
15. Whether such lien existed with respect to foreign vessels, or whether the Court of Admiralty had jurisdiction to enforce it, seems never to have been settled prior to the passage of the Act of 8 and 4 Vict. This statute was, however, simply declaratory of the maritime law with respect to the existence of the lien as it was prior to its passage, and vested jurisdiction to enforce it in the Admiralty Courts. *ibid.*
16. Want of jurisdiction to enforce a lien in any particular locality is not fatal to the existence of the lien. The lien exists by virtue of the general maritime law—it follows the ship wherever she goes, and may be enforced wherever there is jurisdiction to enforce it. *ibid.*
17. There is a lien in Canada for supplies furnished an American vessel, and a Court of Admiralty has power to enforce this lien. *ibid.*
18. A lien for supplies is divested by an assignment of the claim. *ibid.*
19. A maritime lien exists for moneys advanced to purchase or pay for necessities supplied to a ship wherever it would exist for the necessities themselves. *The Union Express*, 537
20. Such lien exists for necessities furnished upon request of the owner wherever it is shown affirmatively they were furnished on the credit of the vessel. *ibid.*
21. Where money was advanced by one who held the legal title to the vessel under a bill of sale given to him as security for the indorsement of a note which had been paid by the maker and the bill of sale thereby extinguished: *Held*, the lien was not thereby defeated. *ibid.*
22. Where, however, libellant was jointly interested with the equitable owner in the profits of one trip: *Held*, he could not recover for advances made during that trip. *ibid.*
23. Parties may stipulate for a lien for necessities, notwithstanding that no such lien is implied by the law of the place where such necessities are furnished. *ibid.*
24. By the general maritime law a lien exists for necessities furnished a domestic vessel, even though by the law of the place there may be no jurisdiction to enforce it. *ibid.*
- See TOWAGE, 15.
STALE CLAIM, 1.
MARSHALING OF LIENS,
1, 2.
MATERIAL-MEN, 2, 3.
- LIGHTERS.
- See JURISDICTION, 15, 16, 17.
- LIMITATION.
- See STALE CLAIM.
- LIMITATION OF LIABILITY.
1. Libellant's agent, who was in-

tending to take passage on a steamboat from Detroit to a Canadian port, intrusted a quantity of gold coin to the master before the vessel started, without taking a bill of lading or delivering a note in writing. On returning on board, the coin was missing:

Held, the vessel was not liable.
The Island Queen, 279

LOOKOUT.

See COLLISION.

M

MARSHAL.

1. The marshal has no authority, as such, to direct repairs to a vessel beyond what are necessary to her preservation while in his custody; but if repairs are furnished upon the order of the master, the fact that he was, without the knowledge of the libellant, holding the vessel as custodian for the marshal, will not prevent a lien attaching. *The Sultana*, 85
2. The marshal is entitled only to his actual necessary expenses for ship-keeping, which must be established by vouchers or otherwise to the satisfaction of the Court. *The Free Trader*, 72

MARSHALING OF LIENS.

1. Strictly maritime liens have priority over mortgages, without reference to the period of time when they accrued. Material-men, having liens by local laws, have priority over mortgagees in the distribution of the surplus. In this case, the Court ordered the different classes of liens paid as follows:

First, Maritime liens.

Second, Liens given by State laws.

Third, Mortgage liens.

Fourth, The assignee in bankruptcy of the owner. *The St. Joseph*, 202

2. Advances made by a mortgagee to subsisting lien holders at the time of taking possession under the mortgage should be paid in the order in which the liens themselves would have been paid. *ibid.*
3. In the distribution of proceeds, salvage services, rendered in getting a vessel off a reef, are entitled to priority of payment as against a claim for general average arising from the jettison of a portion of her cargo. *The Spaulding*, 310
4. The fact that one of the salvors had the promise of a third party to pay him if he could not collect from the vessel, does not oust him of his priority. *ibid.*

MASTER.

1. A master's certificate as to the amount agreed to be paid for services will not be set aside, unless it appear clearly and satisfactorily that the sum named is so unreasonable as to raise a suspicion of fraud. *The Senator*, 544
2. The making of such certificate under a threat to attach the vessel is not such duress as will avoid its effect. *ibid.*

See EVIDENCE, 8, 4.

LIEN, 10.

MATERIAL-MEN.

1. Where coal was bought for a tug, then lying at a distant port, by

one who purported to be the master and owner, held that the seller was bound to ascertain the extent of the purchaser's authority, and the necessity for the purchase of the coal. *The Hamilton Morton*, 40

2. No unforeseen and unexpected emergency need be shown to warrant a lien in favor of a materialman. Where the master obtains supplies, they are generally supposed to be sold on the credit of the vessel, and in such cases the vessel is liable. *The St. Joseph*, 202

8. A part owner and general agent and superintendent of a line of boats, of which the respondent was one, has no lien for materials, but must be regarded as having given credit to the company. *ibid.*

See WHARFAGE, 2.
LIEN, 8, 14, 15, 19, 20, 21, 22, 23, 24.
JURISDICTION, 20.

MORTGAGES.

See PRACTICE, 15.
SEAMAN'S WAGES, 2.
MARSHALING OF LIENS, 2.

N

NAVIGATION LAWS.

1. A small steamer was engaged in transporting freight and passengers upon Grand River, between Grand Rapids and Grand Haven, in the State of Michigan. Although her route was wholly within the State, she carried freight consigned to and from other States, which was transhipped at Grand Haven. She also carried passengers on their way to and from

Chicago and Milwaukee. In the opinion of the Court, she was subject to inspection and license under the navigation laws of the United States, but as a different view of the law had been taken in the same and other districts:

Held, out of deference to these opinions, and for the sake of uniformity, the libel should be dismissed. *The Daniel Ball*, 198

NEGLIGENCE.

See AFFREIGHTMENT, 1, 2.
TOWAGE, 16.
SALVAGE, 14.
COLLISION, *passim*.

P

PART OWNER.

See MATERIAL-MEN, 8.

PLEADING.

1. The fact that prior to the collision, an interest in the injured vessel had been transferred to an alien, and a forfeiture thereby incurred, does not prevent such alien owner from joining in the libel, the forfeiture never having been judicially declared by a condemnation. *The Nabob*, 115

2. The allegations and proofs must coincide; and the Court cannot consider evidence not in accordance with the issues made by the parties. *The Morton*, 137

3. An omission to state in the libel a material fact, peculiarly within the knowledge of the opposite party, as that one of the colliding vessels was improperly manned, will not be allowed to work an injury to the libellant, if the Court can see there was no design

on his part in omitting to state it. *The Coleman & Foster*, 456

4. A libel sufficient under the general maritime law is sufficient in cases arising upon the lakes, and no averment is required to bring it within the Act of 1845. *The Illinois*, 497

5. It is unnecessary to aver that the vessel in question is engaged in navigation, or capable of being so employed. *ibid.*

See AMENDMENT, 1.
PRACTICE, 6, 22.
STALE CLAIM, 3.

PRACTICE.

1. A motion for a certificate of probable cause of seizure may be made subsequent to the decree, and upon the hearing of such motion the Court is not limited to the evidence introduced upon the trial, but may receive any evidence tending to show that the collector acted upon a reasonable suspicion. *The Gala Plaid*, 1
2. In determining the question, the Court is not at liberty to consider the fact that the seizure was made at night, without proper warrant, and that the conduct of the officer was otherwise oppressive and cruel, as his certificate would not protect him in an action for a personal trespass. The Court can only consider whether his action was malicious and groundless, or whether he acted upon a reasonable suspicion that the goods were smuggled. *ibid.*
3. It seems a Court of Admiralty has no general power, at least after expiration of the term, to set aside a final decree on the

ground of oversight, inadvertence, or mistake. *The Illinois*, 13

4. The ten days allowed by Rule 40 for setting aside a decree, are restrictive, and a motion made after this time cannot be entertained. *ibid.*

5. A vessel, bought with the money of C., was enrolled in the name of M., as owner and master, he agreeing to hold her in trust for C. until all his advances had been repaid. While in the hands of M., who was navigating her for charterers, she was attached, condemned, and sold at marshal's sale, without the knowledge of C., and was bid in by the charterers. Upon learning of the sale, C. came into Court, filed his petition for the remnant, and six weeks afterwards withdrew this, and filed another praying that the sale and decree of condemnation might be set aside, and he be permitted to intervene and defend. The vessel in the mean time had been delivered to the purchasers, who had taken her to Canada and repaired her, and the claims upon which she was libelled had been paid. Petition denied. *The Kaloolah*, 55

6. A simple allegation of fraud in a petition to set aside a sale, without setting forth the facts which constitute the fraud, is insufficient. *ibid.*

7. A deposition, entitled in the District Court, but not received by the clerk until after the trial there, and not sent up as a part of the record of that court, cannot be read on appeal. *The Buckeye State*, 65

8. The giving of a stipulation to answer judgment is a waiver of an illegal service of process. *The Acadia*, 73

9. A tender after suit brought must include costs, though the process has not been served. *The Sunshine*, 75
10. The assignment, by the builders of a vessel, of the moneys to become due on the building contract, invests the assignee with no such proprietary interest as will enable him to appear as claimant and defend. *Revenue Cutter No. 1*, 76
11. Though a deposition be taken under a stipulation waiving "all objections as to the form and manner of taking," it must still be returned to Court in all respects as provided by law. *Livingston v. Pratt*, 66
12. Where a deposition so taken was left for several months in the hands of defendant's attorney, and was not placed on file until the morning of the trial, it was held it could not be read. *ibid.*
13. Depositions opened out of Court and without the consent of the opposite party, cannot be read in evidence. *The Roscius*, 442
14. Such consent to publication out of Court should be in writing.
15. A mortgagee of a vessel has a right to intervene in an admiralty suit for the protection of his interest. *The Old Concord*, 270
16. A vessel, discharged from arrest upon giving bond or stipulation, returns to her owner forever discharged from the lien which was the foundation of the proceedings against her, and the Court has no power to order her rearrest. *ibid.*
17. *It seems* where the sureties become insolvent, the Court may require the claimant to furnish new sureties, on penalty of contempt, or of being denied the right to appear further and contest the suit. *ibid.*
18. A seaman suing for his wages cannot be compelled to give security for costs for the sole cause that the amount claimed is small, and the indebtedness is denied in the answer. *The Arctic*, 847
19. Objections to a libel for want of specific allegations of fault should be taken by exceptions, and if taken at the hearing, an amendment will be permitted. *The Coleman and Foster*, 456
20. A joint action for collision cannot be maintained *in rem* against one vessel, and *in personam* against the owner of another. *The Young America*, 462
21. *Quare*—Whether the defense of infancy can be made available otherwise than by a plea to the competency of libellant to sue in his own name? *The Melissa*, 476
22. A motion to strike the claim and answer from the files, on the ground that it appeared on the hearing that the claimant had no interest in the property at the time the answer was filed, will not be entertained. *The Prindiville*, 485
23. If the claim is not put in issue, and libellant goes to a hearing upon the merits without objection, it is a waiver of such preliminary inquiry, and an admission that the claimant is rightly in Court. *ibid.*
24. The right of a party to appear and defend a suit *in rem* must be put in contestation, if at all, before the hearing, and then only by way of exception if the disability appear upon the face of the claim, or an exceptive alle-

gation putting the right in issue if it does not so appear. *ibid.*

25. The 53d Rule in Admiralty, requiring the respondents in a cross-libel to give security to respond in damages as claimed in the cross-libel, applies as well to actions *in rem* as to those *in personam*. *The Toledo*, 445

See AMENDMENTS, 3, 5, 6.
SEAMAN'S WAGES, 4.
STALE CLAIM, 3.
JURY.

PROBABLE CAUSE.

See PRACTICE, 1, 2.
EVIDENCE, 1.

R

REPAIRS.

See MARSHAL, 1.

REVENUE LAWS.

1. Where a vessel and cargo appears by her manifest to be consigned to an American port, parol evidence will not be permitted to control the intention so expressed, and to show that the cargo was, in fact, destined to a Canadian port. *The Flame*, 42
2. Under the first section of the Act of 1831, the master of a vessel entering a port of the United States, with merchandise subject to duty on board, and consigned to such port, is bound to deliver his manifest, notwithstanding he may intend such merchandise to be returned to Canada. *ibid.*
3. The transshipment of a cargo from one vessel to another, while lying at a wharf in port, is an unloading and delivery within the

meaning of the 50th section of the Act of 1799. *ibid.*

4. Innocence of an intent to defraud the revenue will not prevent a forfeiture where a violation of the statute is clearly proven. *ibid.*

5. Under section 28 of the Act of 1799, the reception by one vessel of goods unladen from another without a permit, subjects the receiving vessel to forfeiture irrespective of a fraudulent intent on the part of her officers. *The Ploughboy*, 48

6. The fact, that efforts were made to find an officer, which were unsuccessful on account of the lateness of the hour, and that the master was impatient to proceed, furnish no legal excuse. *ibid.*

7. A person who goes to a foreign country for the purpose of buying clothing, is not within the provisions of section 3, of the Act of March 3d, 1857, providing for the free entry of "wearing apparel in actual use" * * of persons arriving in the United States," notwithstanding he wears the same in returning home. *Simmons Case*, 128

S

SALVAGE.

1. In stripping an abandoned vessel of her apparel and furniture, salvors are bound to the exercise of reasonable care, and gross neglect or wanton injury of the property saved works a forfeiture of all claims for salvage, and renders them liable for the damage. *The Sumner's Apparel*, 52
2. It is the duty of salvors to land the property saved at the nearest

- port of safety, and see that it is properly cared for. *ibid.*
3. Where salvors stripped a vessel, having her name and port painted on her stern, and carried the property saved directly past her home port:
Held, they were guilty of embezzlement, and forfeited their right to compensation. *ibid.*
4. Salvage being the compensation allowed to persons by whose assistance a ship or cargo is saved from impending peril, if the property is not benefited by the exertions of the salvors, they can claim no compensation as salvage. *The Sailor's Bride*, 68
5. But if an effort be made in good faith, with means believed to be adequate, the salvor may recover something in the nature of a *quantum meruit*, though his efforts are unsuccessful. *ibid.*
6. Services rendered in pulling boilers out of a navigable river, into which they had fallen from a steamboat, are salvage services. *The Silver Spray's Boilers*, 349
7. An agreement for a specific sum dependent upon success does not alter the nature of the service as a salvage service, but only furnishes a rule of compensation. *ibid.*
8. Such an agreement will not be set aside and a commensurate salvage awarded because it proves to be a hard one for the salvor. *ibid.*
9. A person hired by the salvor to assist him, with knowledge that his employer is operating under a contract, is also limited in the amount of his recovery by the contract price, and the fact that he is misinformed as to the terms of the contract, creates no additional liability on the part of the property or its owners. *ibid.*
10. A wrecking company which had undertaken to raise a sunken schooner and deliver her at Detroit for six-tenths of her value when so delivered, hired of libellant, for a fixed compensation, certain divers, diving armor, and wrecking apparatus.
Held, that libellant, having knowledge of the contract between the wrecking company and the owners of the schooner, could not maintain a libel *in rem*, and that the subsequent ownership of six-tenths of the schooner by the wrecking company could not relate back to the time of its contract with the owners, so as to affect their interests. *The Marquette*, 364
11. A salvor by contract is not an agent of the owners, and cannot create against them or the property saved, any liability beyond the contract price. *ibid.*
12. A contract for a compensation to be paid at all events, whether the property is saved or not, creates a mere personal obligation, and no lien attaches on account of it. *ibid.*
13. A vessel and cargo, valued at \$5,000, were found in Lake Erie, waterlogged, abandoned, and apparently, though not in fact, derelict. A portion of her cargo was taken off and put upon the salving vessel, a steam barge, by which she was towed to a place of safety, the whole time occupied by the service being six hours:
Held, that, under the circumstances, \$75 was a proper salvage compensation. *The Senator*, 372
14. Salvors are liable for damage done to the sails of the vessel

saved by being negligently left exposed to sparks from the salvaging vessel. *ibid.*

15. Where a barge, without small boat, provisions, sails or other means of propulsion, was adrift upon Lake St. Clair, although she had come to anchor, and the weather was good,

Held, that she was in a situation to have salvage services rendered her, but that an adjustment of the same made by the owner of the cargo, was not binding upon the vessel. *The Union Express*, 516

See JURISDICTION, 3.

LIEN, 9, 11.

MARSHALING OF LIENS, 8, 4.

SEAMAN'S WAGES.

1. The engineer of a steamboat has no authority to make any alteration in the engine at the home port without the consent of the owner, and his conduct in so doing will work a forfeiture of his wages. *The John Martin*, 149

2. A mortgagee in possession is liable for seaman's wages. *The Bramen*, 161

3. The provisions of section 6 of the Merchant Seamen's Act of 1790, with respect to the recovery of wages, apply only to the classes of vessels enumerated in the first section of the Act. *The M. W. Wright*, 290

4. The proceedings by summons to the master, provided for in section 6, are cumulative and optional, and the party may resort to an attachment in the first instance. *ibid.*

5. Where a seaman is hired at a certain sum "for the season" of

navigation, the presumption is that the service is for the entire season. *The Balise*, 424

6. The "season of navigation," as understood upon the lakes, comprises the eight months commencing April 1st, and ending November 30th. *ibid.*

7. Leaving a vessel before the expiration of the time of service, without the consent of the master, with the intention not to return, constitutes desertion by the maritime law. *ibid.*

8. Such desertion works a forfeiture of all antecedent wages, unless a reasonable excuse be shown, founded upon gross misconduct or harsh usage. *ibid.*

9. Slight and transient causes, such as the fact that the meat used on board was for a short time slightly tainted, do not constitute such an excuse as to relieve from forfeiture. *ibid.*

10. A minor may recover for his wages where the contract was made personally with him, and it does not appear that he has any parent, guardian, or master entitled to receive his earnings. *The Melissa*, 476

11. Where a seaman employed upon a steamboat by the month, left before the expiration of the month he was then serving, *Held*, his entire unpaid wages were forfeited. *The Magnet*, 547

12. Where the second engineer is employed by the first engineer, the latter has a right to discharge him for good cause, without, and even against, the consent of the master. *ibid.*

13. Where an engineer wilfully deranged his engine, in order to compel the boat to stop at a cer-

tain port at which he desired to leave, it was held such misconduct as worked a forfeiture of wages. *ibid.*

See LIEN, 1.

SEIZURE.

See PROBABLE CAUSE.

SMUGGLING.

See REVENUE LAWS.

STALE CLAIM.

1. A claim for towage accrued against a vessel in May and June, 1865, while she was in the hands of a person who had contracted to purchase her. Having failed to fulfill his contract; she was returned to the owner, who took her to Canada within a month or two after the services were rendered, where she remained until June 27th, of the following year. She was there resold to a *bona fide* purchaser, without notice, who brought her within the jurisdiction of the Court, and kept her during the remainder of the summer. On October 6th, the libel was filed and the vessel attached.

Held, That the lien was waived, and the action could not be maintained. *The Detroit*, 141

2. A *bona fide* purchaser under a bill of sale does not lose the protection of the law by taking the collateral guaranty of a third party, indemnifying him against liens. *ibid.*

3. The defense of stale claim must be set up in the answer, and will not avail where the owner has retained a portion of the purchase money in his hands, and the suit is defended in the interest of the vendor. *The Melissa*, 476

4. Where the buyer of a vessel who had given non-negotiable notes for the purchase money, advanced \$2,000 on account of certain claims against her, taking up his notes to this amount, and neglected to ascertain the nature and full amount of the claims, which information was easily accessible, it was

Held that, in suits for the residue of the claims, he did not stand in the position of a *bona fide* purchaser without notice, though he had paid for the vessel in full. *The Atalanta*, 489

5. The purchaser of a vessel is bound to the exercise of reasonable diligence to ascertain the nature and amount of liens against her. *ibid.*

6. Notice to a purchaser, while a sufficient amount of purchase money remains unpaid to meet the liens, is as effectual to keep the liens alive as it would be if he had such notice at the time of such purchase. *ibid.*

7. Creditors of vessels plying upon the lakes must enforce their liens as against *bona fide* purchasers without notice, during the current season of navigation, or within such reasonable time after the commencement of the next season as may be necessary to arrest the vessel. *The Hercules*, 559

8. Circumstances may occur which would greatly abridge or lengthen this time. *ibid.*

9. The fact that the former owner of the vessel told the buyer, when purchasing her, that there might be some small claims against the vessel which he would pay—that he did not know what the claims were or who held them—would not, in the absence of negligence, affect the purchaser with knowledge of any particular claim. *ibid.*

10. The fact that the purchaser takes a mortgage upon another vessel, indemnifying him against any claims upon the vessel purchased, does not operate to extend the time within which creditors should pursue their claims, or deprive him of his rights as a *bona fide* purchaser without notice. *ibid.*
11. Nor can mere notice of the existence of a certain claim affect his rights, unless such notice be had at the time of purchase or of payment. *ibid.*
12. Where a claim accrued in August, 1873, and the libel was not filed until September, 1874, and the vessel in the mean time was easy of access, and several times in the port where the supplies were furnished,
Held, that as against a person who bought and paid for her in January, without notice of the claim, the lien must be deemed waived. *ibid.*
- 1804, March 26, Arson upon High Seas, 157
- 1807, Feb. 24, Certificate of Probable Cause, 1
- 1815, March 8, Seizures of Smuggled Goods, 6
- 1821, March 2, Importation of Goods, 42
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STATE COURTS.

See JURISDICTION 5.

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- 1789, Sept. 24, Depositions *de bene esse*, 442, 66
- 1789, Sept. 24, Admiralty Jurisdiction, 340, 86
- 1790, July 20, Merchant Seamen's Act, 290
- 1792, Feb. 12, Enrollment of Vessels, 117
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- 1840, Watercraft Law, 101
- 1843, March 11, Watercraft Law, 78
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- 1858, April 12, Watercraft Law, 101

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- 3 and 4 Vict. (1840), Admiralty Court Act, 526

STEAMBOATS.

See NAVIGATION LAWS, 1.

T

TENDER.

See PRACTICE, 9.

TOWAGE.

1. Where a number of vessels, connected by long lines, are towed astern of a tug, they are to be considered as under the government and control of the tug, and for any damage done by them, by the want of ordinary care on her part, the tug is responsible. *The Lyon*, 59
2. Towage services are maritime in their character. *The Acadia*, 73
3. The contract of towage implies knowledge of the channel and safe pilotage. *The Zouave & Rich*, 110
4. Good seamanship requires that vessels of heavy draft should be placed behind those of lighter draft. *ibid.*
5. A tug, whose master also acts as pilot and engineer, is not properly manned. *The Armstrong*, 130
6. It is the duty of a tug towing a vessel through a narrow channel and encountering a snow storm so heavy as to obscure the sight, at once to stop and cast anchor. *ibid.*
7. The want of a competent lookout is a fault of the grossest description. *ibid.*
8. A tug is bound to the exercise of ordinary care in taking up, arranging and managing the tow. *The Morton*, 137
9. Having full control of the vessels towed, she must direct as to the length of their lines, the order in which they shall be towed, and prudence requires that the heavier draft vessels should be placed behind those of lighter draft. *ibid.*
10. The tug is bound to know the channel, and to keep the tow in the deepest water. *ibid.*
11. If the ordinary lights or landmarks are obscured, the tug should provide for the emergency by slowing or stopping the engine, and sounding the channel. *ibid.*
12. Tugs, though not liable as common carriers, are bound to the exercise of ordinary skill and diligence in taking up, arranging and managing their tows. *The Stranger*, 281
13. It is also the duty of vessels in tow to use all possible means to avoid injury, and where injury ensues, to do all in their power to make the damages as light as possible. *ibid.*
14. A tug, using ordinary care, is not liable for the sudden and unexplained sheering of the tow to the right or left. *ibid.*
15. A lien attaches for towage services rendered in the home port. *The General Cass*, 334
16. Where a tug, which had agreed to tow a barge from Saginaw to Cleveland, was compelled by stress of weather to turn the barge over at an intermediate port to the master of another tug, by whose negligence she was lost: *Held*, that the owner of the barge could maintain an action for negligence against the second tug.
Quære: Whether he could not also support an action for breach of contract. *The Clematis*, 432

17. Where a tug abandons her tow of bargea during a storm, the burden is upon the tug to show a sufficient excuse for such abandonment. *The Olematis*, 499

18. Much, however, must be left to the judgment of competent officers in such an emergency, and such judgment formed upon the spot and acted upon in good faith will not be impeached, except upon a clear preponderance of proof that was erroneous. *ibid.*

19. Where it was shown that the tow-line parted in the night, during a storm of great severity, and that the master of the tug was unable to pick up the line, to discover the lights of the tow, or to make any efforts to regain it without great danger to the tug: *Held*, he was justified in abandoning it. *ibid.*

See JURISDICTION, 3.

W

WATERCRAFT LAWS.

See JURISDICTION, 5.

WHARFAGE.

1. Wharfage is the use of a wharf by a vessel for the loading or unloading of goods or passengers. Mere anchorage at a wharf is not wharfage. *The Gem*, 87

2. The use of a wharf is not "material" for a ship, within the meaning of the 12th Rule, nor is a wharfinger a material-man. *ibid.*

3. The maritime law does not give a lien for wharfage. *ibid.*

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